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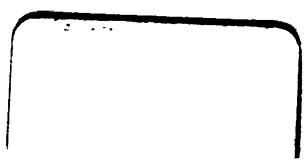

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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES,

JANUARY TERM, 1850.

By BENJAMIN C. HOWARD,

Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

VOL. VIII.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS

BY

STEWART RAPALJE,

Author of the "Federal Reference Digest," etc.

THE BANKS LAW PUBLISHING CO.
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1905

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SUPREME COURT OF THE UNITED STATES.

HON. ROGER B. TANEY, Chief Justice.
HON. JOHN McLEAN, Associate Justice.
HON. JAMES M. WAYNE, Associate Justice.
HON. JOHN CATRON, Associate Justice.
HON. JOHN McKINLEY,* Associate Justice.
HON. PETER V. DANIEL, Associate Justice.
HON. SAMUEL NELSON, Associate Justice.
HON. LEVI WOODBURY, Associate Justice.
HON. ROBERT C. GRIER, Associate Justice.

REVERDY JOHNSON, Esq., Attorney-General.

WILLIAM THOMAS CARROLL, Esq., Clerk.

BENJAMIN C. HOWARD, Esq., Reporter.

RICHARD WALLACH, Esq., Marshal.

*Mr. Justice McKinley was prevented from attending the court during this term, being engaged during that period in holding an important session of the U. S. Circuit Court at New Orleans.

RULES OF COURT.

No. 54.

ORDERED, that where an appearance is not entered on the record for either the plaintiff or defendant on or before the second day of the term next succeeding that at which the case is docketed, it shall be dismissed at the costs of the plaintiff.

No. 55.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.

No. 56.

ORDERED, that printed arguments under the fortieth rule shall not hereafter be received, unless filed within the first ten days of the term.

No. 57.

ORDERED, that when a division of opinion is certified to this court by a Circuit Court, the parties shall be placed on the docket of this court, as plaintiff and as defendant respectively, in the

manner in which it shall appear from the statement of the case they stand in the Circuit Court.

No. 58.

ORDERED, that twelve printed copies of the abstract, points, and authorities required by the 53d rule, be filed with the clerk three days before the case is called for argument, — nine of these copies for the court, one for the Reporter, one for the opposing counsel, and the remaining one to be retained by the clerk.

This order to take effect on the first day of May next.

April 24, 1850.

LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED DECEMBER TERM, 1849.

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Volney E. Howard,	*Texas.*
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John N. L. Stratton,	*New Jersey.*
Charles B. Sedgwick,	*New York.*

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THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES

AT

JANUARY TERM, 1850.

THE UNITED STATES, APPELLANTS, *v.* BURROUGHS E. CARR AND JOHN PECK, CLAIMANTS OF SIXTEEN BOXES OF HAVANA SUGAR, TWELVE BASKETS OF CHAMPAGNE WINE, &C.

THE UNITED STATES, APPELLANTS, *v.* BURROUGHS E. CARR AND JOHN PECK, CLAIMANTS OF TEN BOXES, TWENTY HALF-BOXES, AND SIX QUARTER-BOXES OF RAISINS, FOUR KEGS OF GRAPES, &C.

The sixteenth section of the act of Congress, passed on the 18th of February, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same" (1 Stat. at L., 305[1]), prescribes the manner in which foreign merchandise shall be specified in the manifest of a vessel going coastwise, and imposes a pecuniary penalty upon the master for failing to comply with it; but does not forfeit the goods.

The forfeiture provided in the seventeenth section was intended to apply to cases where the foreign merchandise was not included at all in the manifest, and not to cases where it was included in fact, although not with legal precision, and where there was no bad faith.[2]

The act of May 31st, 1844 (5 Stat. at L., 658), gives jurisdiction to this court in revenue cases, without regard to amount, only where the judgment is rendered in a Circuit Court of the United States. Therefore, where the case was brought from the Court of Appeals for the territory of Florida, and the amount in controversy did not exceed one thousand dollars, the case must be dismissed for want of jurisdiction.[3]

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[1] Rev. Stat., § 4371.

[2] A coasting vessel arriving at one district from another in the same state, with foreign goods on board exceeding $800 in value, without a manifest thereof, does not thereby incur a forfeiture under the act of 1793. *The America*, 1 Gall., 231.

[3] CITED. *Seaver* v. *Bigelows*, 5 Wall., 210. The act of 1844 includes cases affecting the revenue of the post office department. *United States* v. *Bromley*, 12 How., 88; but does not embrace the case of an action against a collector to recover back duties paid under protest, where the amount recovered is less than $2,000. *Mason* v. *Gamble*, 21 How., 390.

The United States v. Carr et al.

THESE two cases were brought, by appeal, from the Court of Appeals for the Territory of Florida, and were argued together. The questions involved were the same in both. The first of the two cases was this:

In January, 1844, the schooner Hope W. Gaudy was about to sail from the port of New York to that of St. Augustine in Florida, the vessel being licensed for carrying on the coasting trade. Maurice Gaudy, the captain of the schooner, produced to the collector of New York the following manifest, viz.:—

Manifest of the cargo on board the schooner Hope W. Gaudy, Gaudy, master, burden one hundred and forty tons, bound from New York for St. Augustine, Fla., January 13th, 1844.

Marks.	No.	Packages and contents.	Shippers.	Residence.	Consignees.	Residence.
B. E. C. & Co.	1	Eighteen hundred and fourteen packages mdse.	John Peck	New York	B. E. Cantello	St. Augustine.
J. M. H.	2	Three pack. mdse.	Do	Do.	J. M. Hernandez.	Do.
C. Burt & Co.	3	Eleven do. do.	Do.	Do.	G. Burt & Co.	Do.
S. S. P.	4	Twenty-three do.	Do.	Do.	S. S. Peck.	Do.

MAURICE GAUDY.

The oath taken by Gaudy, and the permit to sail granted by the collector of New York, were as follows:—

L. D. C. I, Maurice Gaudy, master of the schooner Hope W. Gaudy, do solemnly swear to the truth of the annexed manifest; and that, to the best of my knowledge and belief, all the goods, wares, and merchandise of foreign growth or manufacture therein contained, were legally imported, and the duties thereon paid or secured; so help me God.

MAURICE GAUDY.

Sworn to this 13th day of , 1844.

G. W. DAVIS, *D'y Col.*

District of New York, Port of New York:

M. Gaudy, master of the schooner Hope W. Gaudy, of Cape May, having sworn, as the law directs, to the annexed manifest, consisting of four articles of entry, and delivered duplicate thereof, permission is hereby granted to the said schooner to proceed to the port of St. Augustine, in the state of Florida.

Given under our hands, at New York, this 13th day of January, 1844.

D. W. D. K.

G. W. DAVIS, *D'y Collector.*

J. DAVENPORT, *D. Naval Officer.*

On the arrival of the vessel at St. Augustine, the manifest

was presented to the collector, who made upon it the following indorsement:—"No. 3 A, inward schr. Hope W. Gaudy, of Cape May, Maurice Gaudy, master, 140$\frac{74}{95}$ tons, from New York, entered January 25th, 1844."

On the 29th of January, 1844, the District Attorney of the United States filed, in the Superior Court for the District of East Florida, a libel against "sixteen boxes of sugar, twelve baskets of Champagne wine, twenty-five sacks of Liverpool salt, five cases and five baskets of olive oil, ten boxes of French cordial, seven casks of London porter, two casks of Scotch ale, *two half-pipes of French brandy, one pipe [*3 Holland gin, thirty half-boxes and twenty-four quarter-boxes of raisins, ten bags of cassia, two boxes of citron, five chests of tea, one frail (or basket) of almonds, three drums of figs, two boxes of lemons, and ten bags of coffee."

The libel alleged that the said merchandise was not (nor was any part thereof) specified or certified in the manifest of the cargo of the said vessel, as is required by the act of the Congress of the same United States, in such case made and provided, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

The libel then claimed that the merchandise had become forfeited to the uses specified by law.

In March, 1844, Burroughs and Carr filed their claim as owners of the goods. After sundry proceedings which it is not material to state, the cause came up for hearing, when the judge dismissed the libel. The United States carried it to the Court of Appeals, which affirmed the judgment of the court below. An appeal was then taken to this court.

The act of Congress under which the libel was filed was the act of 18th February, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." 1 Stat. at L., 305.

By the sixteenth section, it is enacted, that "the master or commander of every ship or vessel licensed for carrying on the coasting trade, and being destined from any district of the United States to a district other than a district in the same or an adjoining state on the sea-coast, or on a navigable river, shall, previous to her departure, deliver to the collector residing at the port where such ship or vessel may be, if there is one, otherwise to the collector of the district comprehending such port, or to a surveyor within the district, as the one or the other may reside nearest to the port at which such ship or vessel may be, duplicate manifests of the whole cargo on board such

ship or vessel, or if there be no cargo on board, he shall so certify; and if there be any distilled spirits, or goods, wares, and merchandise of foreign growth or manufacture on board, other than what may by the collector be deemed sufficient for sea stores, he shall specify in such manifests the marks and numbers of every cask, bag, box, chest, or package containing the same, with the name and place of residence of every shipper and consignee of such distilled spirits, or goods of foreign *4] growth or manufacture, and the quantity shipped by and for *each, to be by him subscribed, and to the truth of which he shall swear or affirm; and shall also swear or affirm before the said collector or surveyor, that such goods, wares, or merchandise, of foreign growth or manufacture, were to the best of his knowledge and belief legally imported, and the duties thereupon paid or secured; or if spirits distilled within the United States, that the duties thereupon have been duly paid or secured; upon the performance of which, and not before, the said collector or surveyor shall certify the same on the said manifests, one of which he shall return to the master, with a permit thereto annexed, authorizing him to proceed to the port of his destination. And if any such ship or vessel shall depart from the port where she may then be, having distilled spirits, or goods, wares, or merchandise of foreign growth or manufacture on board, without the several things herein required being complied with, the master thereof shall forfeit one hundred dollars; or if the lading be of goods the growth or manufacture of the United States only, or if such ship or vessel have no cargo, and she depart without the several things herein required being complied with, the said master shall forfeit and pay fifty dollars."

And by the seventeenth section it is enacted, that "the master or commander of every ship or vessel licensed to carry on the coasting trade, arriving at any district of the United States, from any district other than a district in the same or an adjoining state on the sea-coast, or on a navigable river, shall deliver to the collector residing at the port she may arrive at, if there be one, otherwise to the collector or surveyor in the district comprehending such port, as the one or the other may reside nearest thereto, if the collector or surveyor reside at a distance not exceeding five miles, within twenty-four hours, or if at a greater distance, within forty-eight hours next after his arrival, and previous to the unlading any of the goods brought in such ship or vessel, the manifest of the cargo, (if there be any,) certified by the collector or surveyor of the district from whence she last sailed, and shall make oath or affirmation, before the said collector or surveyor, that there

was not, when she sailed from the district where his manifest was certified, or has been since, or then is, any more or other goods, wares, or merchandise of foreign growth or manufacture, or distilled spirits (if there be any other than sea stores on board such vessel) than is therein mentioned; and if there be no such goods, and if there be no cargo on board, he shall produce the certificate of the collector or surveyor of the district from which she last sailed as aforesaid, that such is the case; whereupon such collector *or surveyor shall [*5 grant a permit for unlading the whole or part of such cargo (if there be any) within his district, as the master may request; and where a part only of the goods, wares, and merchandise of foreign growth or manufacture, or of distilled spirits, brought in such ship or vessel, is intended to be landed, the said collector or surveyor shall make an indorsement of such part on the back of the manifest, specifying the articles to be landed; and shall return such manifest to the master, indorsing also thereon his permission for such ship or vessel to proceed to the place of her destination. And if the master of such ship or vessel shall neglect or refuse to deliver the manifest, (or if she has no cargo, the certificate,) within the time herein directed, he shall forfeit one hundred dollars; and the goods, wares, and merchandise of foreign growth or manufacture, or distilled spirits, found on board, or landed from such ship or vessel, not being certified as is herein required, shall be forfeited, and if the same shall amount to the value of one hundred dollars, such ship or vessel, with her tackle, apparel, and furniture, shall be also forfeited."

The second of the two cases mentioned in the commencement of this report was similar in its circumstances to the case just stated, except that the goods were brought to St. Augustine in a different vessel, and that the value of the goods was shown by appraisement to be only seventy dollars.

The cases were argued by *Mr. Johnson* (Attorney-General), for the United States, and by *Mr. Wood*, of New York, for the claimants.

Mr. Johnson said that three questions were involved in the case:—

1. Whether the manifest of itself was a sufficient compliance with the sections above quoted of the act of Congress.
2. Whether, if defective, the defect is cured by the certificate of the collector of New York.
3. Whether, if the manifest be in violation of the act, the defect works a forfeiture of the goods.

1st. The manifest was not made out according to law. The 16th section regulates the conduct of the master at the port of departure. He must deliver to the collector a duplicate manifest of his cargo; and must also, if there is any merchandise on board of foreign growth or manufacture, specify the marks and numbers of every cask, bag, box, &c., containing such articles. The object of this is to enable the collector at the port of destination to identify these boxes as being the same which had once paid duties at the custom-house. *6] He must also *make oath that the goods were legally imported. All this being done, the collector is authorized to give him a permit of departure. But it must be evident from an inspection of the record, that the master has not complied with the law. The manifest only says 1,814 packages of merchandise. What was there to prevent the master from substituting other packages, exchanged at sea, for those which he had on board at the time of his departure from New York? The act requires a distinct specification of all the marks on all the boxes. But here it is not even stated whether they contained foreign merchandise or not. The collector at New York could also refer to the marks on the boxes, and ascertain, by the records of his office, whether or not such boxes had been regularly imported; but if the construction contended for on the other side be correct, smuggled goods could be transported coastwise just as easily as those which had paid duties.

2d. The cretificate of the collector at New York does not heal this defect. He is only authorized to certify in case all the requisitions of law are complied with. If his certificate is conclusive, then he is invested with judicial power, and neither the collector of the port to which the vessel is going, nor the district judge, can properly interfere. The manifest is no longer subject to their supervision; although the authority of the first collector to certify is limited to the case of previous compliance with the law on the part of the master. The 16th section says, if he (the master) shall depart "without the several things herein required being complied with," &c.; showing that a compliance with a part would not be sufficient. The power of the collector of New York was therefore limited, and his certificate could not heal the defect in the manifest.

3d. Are the goods subject to forfeiture?

The last paragraph of the 17th section must be construed to refer to the 16th. It says that the "merchandise, not being certified as is herein required," shall be forfeited, and in certain cases the vessel also. But if we show that the merchandise is not certified as the 16th section requires, the forfeiture attaches.

Mr. Wood made the following points:—

1. The manifest in these cases is correct, and made out according to long-established usage.

2. It is sufficient, under the 16th and 17th sections of the act of 18th February, 1793, to insert in the manifest the marks and numbers of the casks, boxes, packages, &c., containing foreign merchandise, with the name and residence of every shipper and consignee thereof, and the quantity shipped by and to each.

*3. All this is done in the manifest in this cause.

4. This provision of the act necessarily and impliedly [*7 requires that the foreign merchandise from one shipper to a consignee shall be distinguished from every other consignment, when either the consignee or shipper, or both, are different, but it does not require that the foreign and domestic merchandise consigned by any one shipper to any one consignee shall be so differently numbered and marked as that the foreign merchandise can, by the numbers and marks, be distinguished from the domestic merchandise.

5. Such distinction in the manifest between the marking and numbering of foreign and domestic merchandise, consigned by one and the same shipper to one and the same consignee, has never been made in practice, and the long-established usage must be considered as settling the construction of the act.

6. The manifest in question is conformable to the most approved precedents. (See American Lex Mercatoria, Appendix.)

7. Assuming that the manifest ought to have been more specific, and so as to distinguish between the foreign and domestic merchandise consigned by one and the same shipper to one and the same consignee, yet the certificate of the collector thereon, and the oath of the master, being correct, and according to the provisions of the said 16th section, the goods are not forfeited under the 17th section of said act, but the master only is subjected to the forfeiture of one hundred dollars under the said 16th section.

8. The forfeiture of the goods under the 17th section is confined to the case where the goods are not certified as required.

9. Penal laws are to be strictly construed, and the interpretation of revenue laws is in favor of the subject, especially in the case of forfeiture of goods for acts not done by the owner thereof. *Hubbard* v. *Johnstone*, 3 Taunt., 177; *Chests Tea* v. *U. States*, 1 Paine, 499.

10. The legislature, in applying the pecuniary penalty upon

the master to any defect in the manifest and certificate in the particulars enumerated in the 16th section, and in limiting the forfeiture of the goods to the prejudice of the owner thereof, in the 17th section, to a defect in the certificate, clearly meant to narrow the ground of forfeiture of the goods, and to confine it to a case of a defect in the certificate, *per se*.

11. If every defect in the manifest should be deemed to extend to the certificate, and to render that defective by relation, so as to cause a forfeiture of the goods to the owner, it would confound the distinction clearly drawn by the act be-
*8] tween the *two cases, and would deprive the owner of the goods of those salutary rules of construction above referred to.

Mr. Chief Justice TANEY delivered the opinion of the court.

The first of these cases arises upon a libel filed in the Superior Court for the District of East Florida, against certain goods which were brought into the port of St. Augustine, in the schooner Hope W. Gaudy, and there seized by the collector as forfeited, for an alleged violation of the revenue laws. The appellants appeared as claimants; and at the trial in the Superior Court, the libel was dismissed, and the decree of dismissal afterwards affirmed in the Court of Appeals for the territory of Florida. From this last-mentioned decree the United States appealed to this court.

The Hope W. Gaudy was regularly licensed to carry on the coasting trade; and the goods in question were part of a cargo shipped at New York for the port of St. Augustine. The master of the schooner, previous to his sailing from New York, delivered a manifest of his cargo to the collector, in which the goods seized were included, with the proper affidavit annexed; and the collector indorsed upon it the certificate and permit to proceed on the voyage, as required by the act of February 18, 1793. This manifest, so certified and indorsed, was in due time after the arrival of the vessel delivered to the collector of St. Augustine.

There is no imputation of bad faith in this transaction, upon the master or owners, or any of the parties concerned. But the forfeiture was supposed to have been incurred by a breach of the provisions of the 16th and 17th sections of the act of Congress above mentioned. Part of the cargo consisted of foreign merchandise. And it was insisted, on the part of the United States, that this portion of it was not marked and described in the manifest, in the manner required by the 16th

section, and was on that account liable to seizure and forfeiture at the port of destination.

We do not think it material to inquire whether the manifest did or did not describe with legal precision the foreign merchandise which the master had taken on board when he sailed from New York. For if the manifest be liable to that objection, the 16th section, which prescribes the manner in which foreign merchandise shall be specified in the manifest, punishes the omission by a small pecuniary penalty on the master: but does not forfeit the goods.

Neither does the clause of forfeiture in the 17th section apply to imperfections of that description. The manifest, which *the master is required by this section to [*9 deliver at the port of destination, is the one certified by the collector at the port of shipment, and this he did deliver. And the law forfeits the foreign merchandise, or distilled spirits, found on board or landed from the vessel, in those cases only in which it is not included in the manifest certified as aforesaid. This is evidently the meaning of the law. But the record in this case shows that the goods seized were included in the manifest; and whether they were there described with legal precision or not is immaterial to this inquiry. For a defect in that respect, where there is no fraud, does not subject the goods to forfeiture, either at the port of shipment or the port of delivery. Indeed, it can hardly be supposed that an offence, which in the 16th section is punished by a small pecuniary penalty on the master, was intended in the succeeding section of the same law to be visited on the owner, and subject him to the aggravated punishment of the forfeiture of his goods; and the more especially as the defect, if any, was the fault of the public officer, who was apprised by the oath of the master to the manifest that foreign merchandise was on board, and whose duty it was, when thus informed, to see that it was designated and described as the law requires before he granted the certificate and permit to proceed on the voyage.

The decree of the Court of Appeals for the territory of Florida must therefore be affirmed.

The other case between the same parties, now before us, is similar in all respects to the one in which I have just stated the opinion of the court. But the record shows that the value of the goods in controversy in this case is only seventy dollars.

The act of May 31, 1844, which gives appellate jurisdiction to this court in revenue cases, without regard to the sum in dispute, gives it only where the judgment is rendered in a Circuit Court of the United States Consequently, it does

not apply to a judgment rendered in the Court of Appeals for the territory of Florida. The right to appeal from that court is regulated by the act of May 26, 1824. And that act limits the appellate power of this court to cases in which the amount in controversy exceeds one thousand dollars.

This case must therefore be dismissed for want of jurisdiction.

Orders.

THE UNITED STATES *v.* CARR AND PECK, CLAIMANTS OF SIXTEEN BOXES OF HAVANA SUGAR, &C.

*10] This cause came on to be heard on the transcript of the record *from the Court of Appeals for the territory of Florida, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Court of Appeals in this case be, and the same is hereby, affirmed.

THE UNITED STATES *v.* CARR AND PECK, CLAIMANTS OF TEN BOXES, &C., OF RAISINS.

This cause came on to be heard on the transcript of the record from the Court of Appeals for the territory of Florida, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that this cause be, and the same is hereby, dismissed for the want of jurisdiction.

HARRIET V. LADD, BY HER NEXT FRIEND, MONTGOMERY D. CORSE, COMPLAINANT AND APPELLANT, *v.* JOSEPH B. LADD, JOHN H. LADD, THE FARMERS' BANK OF ALEXANDRIA, JOHN HOOFF, BENONI WHEAT, AND JOHN J. WHEAT, THE TWO LAST TRADING UNDER THE FIRM OF BENONI WHEAT AND SON, DEFENDANTS.

Where a married woman has power, under a marriage settlement, to dispose of property settled upon her, by the execution of a power of appointment for that purpose, and alleges afterwards that she executed the power under undue marital influence and through fraud practised upon her, but alleges no specific mode or act by which this undue marital influence was exerted, and the facts disclosed in the testimony go very far to contradict the allegation, the charge cannot be sustained.

Every feme covert is presumed, under such a settlement, to be, to some extent, a free agent.

Where the marriage settlement recited that the woman was possessed of a considerable real and personal estate, which it was agreed should be settled to her sole and separate use with power to dispose of the same by appoint-

ment or devise, and then directed that the trustee should permit her to have, receive, take, and enjoy all the interest, rents, and profits of the property to her own use, or to that of such persons as she might from time to time appoint during the coverture, or to such persons as she, by her last will and testament, might devise or will the same to, and in default of such appointment or devise, then the estate and premises aforesaid to go to those who might be entitled thereto by legal distribution,—this deed enabled her to convey the whole fee, under the power, and not merely the annual interest, rents, and profits.

The word "interest" in such settlement, held to be the equivalent of "estate."

Where the marriage settlement gave her the power of appointment to the use of such persons as she might from time to time appoint, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses, and she executed a deed which recited that the parties had thereunto set their hands and seals, and which the witnesses attested as having been *sealed* and *delivered*, this was a sufficient execution of the power, although the witnesses did not attest the fact of her *signing* it. This could be proved *aliunde*.

The authorities upon this point examined.

*THIS was an appeal from the Circuit Court of the United States for the District of Columbia and County of Alexandria, sitting as a court of equity. [*11

The facts of the case were these:

On the 20th of October, 1824, a marriage being about to take place between Joseph B. Ladd and Harriet V. Nicoll, both of the town of Alexandria, the following marriage settlement was executed by those parties:

"This indenture tripartite, made this twentieth day of October, in the year of our Lord eighteen hundred and twenty-four, between Joseph B. Ladd, of the town of Alexandria, of the first part, Harriet V. Nicoll, of the town aforesaid of the second part, and John H. Ladd, of the town aforesaid, of the third part. Whereas, a marriage is shortly to be had and solemnized, between the said Joseph B. Ladd and Harriet V. Nicoll; and whereas, the said Harriet V. Nicoll is now possessed of a considerable real and personal estate, which it has been agreed between her and the said Joseph B. Ladd should be settled to her sole and separate use, with power to dispose of the same, by appointment or devise; and whereas, the said Joseph B. Ladd has agreed to add to the property of the said Harriet V. Nicoll one hundred and sixty-two shares of the Alexandria and Washington Turnpike Company, and the premises hereinafter described, now occupied by Dr. Vowell, which is likewise to be settled in manner aforesaid, with this understanding, that in case the said Harriet V. Nicoll should, after the intended marriage had, happen to survive the said Joseph B. Ladd, she shall not have or claim any part of the real or personal estate whereof the said Joseph B. Ladd should die seized or possessed, or entitled to, at any time during the coverture between them, by virtue of

her dower, or title of dower at common law, or by virtue of her being administratrix, or entitled to the administration of the goods and chattels, rights and credits, of the said Joseph B. Ladd, or in any other manner whatever. Now, this indenture witnesseth, that in pursuance of the agreement aforesaid, and of the sum of five dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said Joseph B. Ladd hath given, granted, bargained, and sold, and by these presents doth give, grant, bargain, sell and convey, unto the said John H. Ladd, his heirs and assigns for ever, a house and lot situated upon the north side of King street, and to the westward of Pitt street, in the said town of Alexandria, and bounded as follows, to wit:—Beginning upon King street, *12] four feet to the eastward of the centre *of the square formed by Pitt and St. Asaph streets, and running thence eastwardly with King street, and bounding thereon twenty-three feet nine inches, be the same more or less; thence northwardly with a line parallel to Pitt and St. Asaph streets, one hundred and nineteen feet; thence westwardly and parallel to King street, the length of the first line; thence southwardly with a straight line to the beginning;—also one hundred and sixty-two shares of Alexandria and Washington Turnpike Company; and the said Harriet V. Nicoll, in consideration of the agreement aforesaid, and of the sum of five dollars to her in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the said John H. Ladd, his heirs and assigns for ever, the following property, to wit:—All that property situated on the east side of Union street, long known by the name of Conway's Wharf, with the warehouses, dwelling-houses, docks, and appurtenances thereto belonging, as it was devised by the late Richard Conway to Joseph Conway, deceased, from whom it descended to the said Harriet V. Nicoll;—also, one lot of ground on the west side of Union street, purchased by the said Joseph Conway of Thomas Conway, by indenture, now of record, in the county of Alexandria; also, all right, title, interest, claim, or demand of the said Harriet V. Nicoll, under the will of her late husband, William H. Nicoll, of Northumberland county, Virginia, or that may have descended to her from her father, Joseph Conway, deceased, or from her mother, or from any other person. To have and to hold all and singular the property hereby conveyed unto him, the said John H. Ladd, his heirs, executors, administra-

tors, and assigns, to his and their only use for ever; upon such trusts, and for such uses, intents, and purposes, as are hereinafter mentioned; that is to say, in trust, for the use of the respective parties who have conveyed the same until the solemnization of the intended marriage, and from and after its solemnization, then upon the trust that the said John H. Ladd, his heirs, executors, and administrators, shall and do permit the said Harriet V. Nicoll, the intended wife, to have, receive, take, and enjoy, all the interest, rents, and profits of the property hereby conveyed to and for her own use and benefit, or to the use of such person or persons, and in such parts and proportions, as she, the said Harriet V. Nicoll, shall appoint from time to time, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses, or to such person or *persons as she, [*13
by her last will and testament in writing, to be by her signed, sealed, published, and declared, in the presence of the like number of witnesses, may devise or will the same to; and in default of such appointment or devise, then the estate and premises aforesaid to go to those who may be entitled thereto by legal distribution; it being the intent of the parties that none of the property hereby conveyed shall be at the disposal of, or subject to, the control, debts, or engagements of the said Joseph B. Ladd.

"In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first before written.

"JOSEPH B. LADD, [SEAL.]
HARRIET V. NICOLL, [SEAL.]
JOHN H. LADD. [SEAL.]"

On the 1st of November, 1824, Joseph B. Ladd, in conformity with the above agreement, transferred to John H. Ladd, the trustee, one hundred and sixty-three shares in the Washington and Alexandria Turnpike Company, being one share more than he had stipulated to transfer.

On the 2d of January, 1827, Harriet V. Ladd, by writing under her hand and seal, executed in the presence of three witnesses, and reciting that it was in pursuance and in execution of the power reserved to her in her marriage settlement, directed the trustee to transfer and assign to John Hooff, cashier of the Farmers' Bank of Alexandria, one hundred and sixty-two shares of the aforesaid turnpike company, "for ever thereafter to be and inure to the benefit of the said John Hooff."

On the same day, the trustee made the transfer, as directed.

In October, 1827, the following proceedings took place at

the Farmers' Bank of Alexandria, and appear upon the minutes of the Directors.

"It is proposed to lend Joseph B. Ladd upon his note, indorsed by John H. Ladd, the sum of $7,000, provided the board shall be satisfied that the real security he may offer shall be good security for that sum;—decided in the affirmative."

"*Oct.* 9, 1827.—The loan provisionally granted to Joseph B. Ladd on the 1st instant, being under consideration, a deed of trust to John Hooff, trustee, signed by John H. Ladd and Harriet V. Ladd, and dated the 9th day of October, 1827, containing a description of the property intended to be conveyed as collateral security for the said loan, having been laid before the board, read, and considered, and upon the question, Shall the said property be deemed good security for the said loan of $7,000? the vote was in the affirmative.

*14] *"Resolved, therefore, that the loan of $7,000 be made to the said Joseph B. Ladd, upon the conditions contained in the said deed; and upon the further consideration, that the said Joseph B. Ladd cause the property contained in the deed to be regularly insured, and the policies assigned over to the trustee, John Hooff; upon this resolution John C. Vowell, Reuben Johnston, John H. Ladd, and Samuel Messersmith, voted in the affirmative; in the negative, Rd. M. Scott."

The deed referred to in the above proceedings, reciting the marriage settlement, conveyed to Hooff all that part of the wharf called Conway's Wharf, lying on the east side of Union street, in the said town of Alexandria, as the same was devised by the late Richard Conway to the said Joseph Conway, the father of the said Harriet, with all buildings, &c., being the property described in, and conveyed by, the marriage settlement, and then proceeded thus:—"And whereas the Farmers' Bank of Alexandria has agreed to loan to the said Joseph B. Ladd the sum of seven thousand dollars, or such part of that sum as he may require, on his notes, to be indorsed by the said John H. Ladd, and discounted at said bank, and to be renewed from time to time, under the indorsement of the said John H. Ladd, or of such other person or persons as the board of directors of said bank may from time to time approve of, according to the usages of said bank, on the following terms and conditions: that is to say, that the said loans and discounts, or interest to become due thereon, shall be secured by an effectual lien on the premises before described; that on the said notes being regularly renewed, and kept up, and on the said interest or discounts being punctually paid on such renewals, and on one thousand dollars of the principal being paid within two

years from the date hereof, the said Joseph B. Ladd shall be allowed the further term of one year, that is to say, three years from the date hereof, for the payment of the residue of said loan; and if within the said third year the said Joseph B. Ladd, his executors or administrators, shall pay to the said bank the further sum of two thousand dollars, and shall pay and discharge the interest or discounts on the said notes as they shall be renewed, then that the time of the payment of the residue of said loan shall be extended one year further, that is to say, for the term of four years from the date hereof, he, the said Joseph, his executors or administrators, paying the interest or discounts on the said notes as they shall be renewed during the said fourth year; and if, within the said fourth year, the said Joseph shall pay the further sum of two thousand dollars of the principal of said debt, then that the time of the payment of the residue *of the said [*15 debt shall be extended one year further, that is to say, for the term of five years from the date hereof; the said Joseph, his executors or administrators, paying the discount or interest on the notes offered for renewal as the same shall be discounted."

The deed then directed, that, if the payments mentioned above were not made, Hooff was to sell the property, "provided, however, that the same shall produce enough to pay and satisfy the whole amount of said loan which shall not be paid, with all discounts and interest which shall be due thereon, and all reasonable charges and expenses of sale." It contained also this important declaration and condition:—"And the said Harriet V. Ladd, in execution of the power of appointment to her reserved as aforesaid, does hereby direct and appoint the premises herein described to be held by the said John Hooff and his heirs on the uses and for the purposes and trusts before recited."

This deed was signed and sealed by the parties thereto, with a memorandum underwritten in these words, in the usual place of attestation:—"Sealed and delivered in presence of George C. Kring, John McCobb, Matthias Snyder, Charles W. Muncaster, Jonathan Field,"—and bore the certificate of the clerk that it was proved as to John H. and Harriet V. Ladd, by three of the witnesses, acknowledged by the trustee, Hooff, and ordered to be recorded.

On the 13th of April, 1829, Hooff re-transferred to John H. Ladd, the trustee, the one hundred and sixty-two shares of turnpike stock, which the trustee had transferred to him on the 2d of January, 1827.

On the 30th of April, 1829, Harriet V. Ladd directed the

trustee to transfer these shares to Sarah Ladd, which was accordingly done on the same day.

On the 21st of November, 1829, Sarah Ladd transferred eighty shares of this stock to the bank, and on the 6th of December following, the remaining eighty-two shares to Sarah Easton Ladd.

On the 16th of December, 1839, the following proceedings took place at the bank:

"*Farmers' Bank of Alexandria, December 16th*, 1839.

"The president and cashier, having made arrangements for further security on the debt of Joseph B. Ladd to this bank, having laid the same before the board, it is ordered to be recorded as follows, viz.:—The Farmers' Bank of Alexandria, having this day received from Mrs. Sarah Ladd a transfer of eighty *shares of stock in the Washington and Alexandria Turnpike Company, as further security for the payment of Jos. B. Ladd's note, amount six thousand dollars, due the said bank and unpaid, with an understanding the stock is not to be sold in less than two years from this date, and then to be applied towards the payment of said note of six thousand dollars, but the said Mrs. Sarah Ladd may direct the payment of the proceeds of said stock at any time previous to the expiration of said term of two years at her pleasure, and then to be applied towards the payment of said note of Joseph B. Ladd, amount six thousand dollars.

*16]

(Signed,) JOHN C. VOWELL, *President.*"

"*Alexandria, November* 21, 1839.

"Amended by introducing a clause that the bank shall not proceed against the property in deed of trust, Conway's Wharf, until two years from this date, and then stock to be sold, without Mrs. Sarah Ladd should prefer to pay for the stock at the par value.

"A copy. JOHN HOOFF, *Cashier.*"

On the 27th of July, 1842, Hooff advertised the real property conveyed to him for sale, and sold it on the 7th of September, for $4,175, to Benoni Wheat and John J. Wheat. Two days before the sale, Hooff by writing consulted Mrs. Ladd respecting the terms of sale, and the parcels in which the property should be sold, and received from her the writing returned indorsed in these words:—"I agree to the above arrangement.—Harriet V. Ladd."

In Feburary, 1843, Harriet V. Ladd, by her next friend, Montgomery D. Corse, filed her bill in the Circuit Court

against her husband, the trustee, the bank, Hooff, and the Wheats.

The bill, after meeting the marriage settlement and the marriage, alleges that under said contract she had no power to convey or dispose of the property settled on her by way of anticipation or otherwise. Nor had she power to appoint the use of the income rents, &c., to any person, for the debts or benefit of her said husband.

That she was induced by the marital influence of her husband, and with the knowledge and connivance of the said bank, to sign a deed of trust to John Hooff, to secure a debt of her husband indorsed by her trustee, which deed is witnessed by four persons in manner and form as shown by the exhibit of it.

That no power is given to the trustee to convey the property, nor could she authorize him, and that said deed of trust is *null and void, and was obtained by marital [*17 influence and coercion, while living with her husband, and her husband did not join in said deed, nor was she separately examined to ascertain if she freely executed it, &c., nor was authorized to execute said deed, without all the forms were complied with.

That she is falsely made in said deed to say that she had previously appointed under her power, when in fact she never had, and that her husband and trustee were acting for their own personal interest.

That said Hooff and said bank have caused the wharf lot to be sold to Benoni Wheat, who holds the same in possession as his property, and refuses to let your oratrix have the same.

That the said bank holds the shares of turnpike stock included in the settlement, as security for the money loaned to her husband.

That she was induced by marital influence to execute an instrument dated 30th April, 1829, as will be shown, directing her trustee to transfer 162 shares of turnpike stock to Mrs. Sarah Ladd, to secure $4,000 loaned by her (as guardian to Sarah Easton Ladd) to your orator's husband, and when the same should be paid to be re-transferred to the use of your orator.

That a settlement having taken place by which Sarah Easton Ladd received 82 shares in full of her claim, the remaining 80 shares were on the 21st of November, 1829, transferred by Sarah Ladd to said bank, without any authority, and they were then the property of your oratrix, and not of Sarah Ladd, as the bank well knew.

That all the said writings, transfers, and doings in the prem-

ises were illegal, and in fraud of her rights secured to her by said marriage contract;—that all the aforesaid actings and doings in the premises, and every act and doing connected with the same, by the aforesaid Joseph B. Ladd, John H. Ladd, John Hooff, Benoni Wheat, and the said Farmers' Bank of Alexandria, were in violation of her rights, and done to defraud her of that property and those rights secured to her or intended so to be by the marriage contract aforesaid.

That the said deed to Hooff, and the pretended assignment of the turnpike stock, ought to be declared null and void as to your oratrix, and she ought to be restored to her property and rights, and quieted against all said parties, and that the dividends on said shares received by said bank for at least four years ought to be paid to her.

The bill then states the desertion of complainant by her husband.

*18] *That the part of the property sold has not paid the debt, and it will take the residue of her property to pay it. It prays that the deed of indenture may be surrendered and cancelled, and that complainant may be quieted against all the defendants in her enjoyment of her said property; that the bank may assign the shares of turnpike stock, or in default pay the value thereof and all dividends received thereon; and it concludes with a prayer for general relief.

In June and July, 1843, Hooff, the Wheats, and the bank filed their answers. The husband and trustee did not answer the bill. This answer denied the complainant's construction of the marriage settlement, insisted upon the competency and regularity of the appointment, and of all the proceedings had in pursuance thereof, averred that the property could be applied to the payment of the debt due to the bank with her consent; that she was *quoad* the property a feme sole; that the loan was made to Joseph B. Ladd on his notes, indorsed by the trustee, and upon the security of the deed of trust; that the greater part of the money was expended upon the improvement of the property which belonged to her; that the complainant was privy and assented to the sale, and set forth the facts connected with the transfer of the turnpike stock, and denied all fraud or undue influence in bringing about any of the transactions between the parties.

To all these several answers there was a general replication and issue; and a commission was issued to take testimony, under which the facts above stated, and those hereinafter adverted to, were established in proof.

On the 6th of October, 1845, the cause came on for hearing,

when the Circuit Court dismissed the bill, with costs. The complainant appealed to this court.

The cause was argued by *Mr. May* and *Mr. Brent*, for the appellant, and *Mr. Francis L. Smith* and *Mr. Jones*, for the appellees.

The points raised by the counsel respectively are thus stated upon their briefs.

For the appellant.

1st. What is the construction and effect of the marriage settlement, and what powers did it confer or restrain?

2d. Have its terms and power been duly executed, so as to make a valid appointment or execution thereof?

3d. Will equity aid the defective execution?

4th. Has the complainant by her own acts precluded herself from the relief prayed, in respect to the property withheld from her?

*5th. Has she not a clear right to the shares of turnpike stock? [*19

6th. Is she not entitled to be quieted in the unsold property, at least to have the deed as to that cancelled?

1st Question.—We contend that the marriage settlement gave her no sweeping power to alienate the property, but only from time to time during coverture to appoint the uses of the income, &c.

In support of this we cannot do better than review Kent's learned opinion, in 3 Johns. (N. Y.) Ch., 87 (see pp. 97, 100, 102–104, 112, and in pages 113 and 114); he concludes that she can only convey as authorized in marriage settlement, and that a power over the income, &c., does not authorize a deed of the whole by anticipation. See on this 2 Kent Com., 166, *n*.

2d Question.—But conceding that she had power to sell and dispose, has she exercised it according to the formula prescribed?

Her marriage settlement requires her appointment to be by an instrument under hand and seal, attested by three credible witnesses.

The appointment relied on by our adversaries as to the real estate is the deed to Hooff.

This deed is defective:—

1st. That it is attested by but two witnesses as to Mrs. Ladd.

2. That the attesting clause only attests the sealing and delivering.

And, first, Mrs. Ladd's execution required three witnesses. See *Hopkins* v. *Myall*, 2 Russ. & M., 86; 1 Id., 535.

Next, the attesting clause is defective. See 1 Roper, pt. 2, 1946, 1947; *Waterman* v. *Smith*, 9 Sim., 629; 3 Mau. & Sel., 512.

This last authority equally destroys the execution of the transfer of the turnpike stock, whether you refer to her first appointment, 2d January, 1827; or her last appointment, 30th April, 1829, under which the bank claims 80 shares.

It is true that the attesting clause as to this stock says simply "witness," which would imply only one witness, and is therefore defective.

But take it as if it were "witnesses" or "witnessed," then parol proof is not admissible to explain how it was witnessed, because the power requires that the seal and signature should be attested. 1 Roper, pt. 2, pp. 197, 198; 9 Sim., 629, and note; 3 Mau. & Sel., 512.

But no parol proof was introduced here to explain how it was executed. 2 Grat. (Va.), 439.

*20] *Then all these appointments are void and defective in forms as required.

3d Question.—Will equity aid these appointments, under the circumstances?

The witnesses required are placed as guards, and their number cannot be aided in equity. *Hopkins* v. *Myall*, 2 Russ. & Mylne, 86; 1 Id., 535.

The counsel here cited and commented on a number of cases. 2 Jac. & W., 425; 1 Myl. & C., 105, 111; 6 Wend. (N. Y.), 9; 20 Law Lib., 74, 75; 3 Russ., 565; 6 Bligh, N. S., 120; 3 Ohio, 529; 7 Beav., 551; 8 Wheat, 229; 1 Pet., 338; 12 Id., 375; 16 Ves., 116; 3 Johns. (N. Y.) Ch., 97–113; 2 Meriv., 483; 8 Leigh (Va.), 21; 2 Russ. & M., 86; 1 Id., 535.

4th Question.—Is Mrs. Ladd equitably estopped from claiming her rights in this property?

It is said that it would be a fraud in her now to claim as against the purchasers.

What are the facts?

First, we objected to Hooff as a witness.

By agreement, Hooff is to be considered as having been examined under an order of court, but the question as to his competency is reserved.

We allege that Hooff is an incompetent witness, because the legal title was passed to him by the original trustee, John H. Ladd, in violation of his trust, and that the legal title being still in Hooff, the decree, if in our favor, would be for

a reconveyance to our trustee, or some other trustee, with costs as against Hooff.

But even conceding Hooff's competency, then his evidence consists of his answer and deposition, per our agreement.

He proves by way of estoppel,—

1st. That he always understood, and verily believes, that a large portion of the loan to Ladd was used in improving the wharf property claimed by complainant.

Answer to this, first, that he does not state it of his own knowledge; secondly, that if he did, it proves no fraud in complainant.

2d. That after an order of the bank directing a sale, the complainant applied for and obtained an extension of the credit payments at the sale.

3d. That, at Mrs. Ladd's request, the bank ordered the property sold should be laid off by certain specified boundaries before the sale, upon the supposition that by such division it would command a large sum, and that in accordance with a previous *understanding, on the 5th of [*21
September, 1842 (two days before the sale), the complainant wrote her approval on Exhibit No. 2.

Answer.—By the deed of trust to Hooff, one month's notice was to be given of the place, time, and terms of sale.

And by the advertisement, the wharf was to be sold, subject to no easement or encumbrance,—and the dwelling and storehouse to be sold at the same time.

All this was advertised to be done on the 7th of September.

But two days before the sale, Hooff and Mrs. Ladd agree, by the paper No. 2, to divide the property and sell the wharf, subject to a right of the dwelling and warehouse to land on the wharf.

Is not this a material change in the terms advertised?

Unquestionably, by the deed of trust these new terms ought to have been advertised one month, which was not done.

But it will be said that Mrs. Ladd agreed to vary the terms, and have the sale without any advertisement of the new terms.

Even if she was competent so to agree, there is no proof that she had ever read the advertisement, or knew what day the sale was to take place.

Nor does it follow, that, when she agreed on the 5th of September to vary the terms of sale as advertised, she had any reason to believe that Hooff would not re-advertise the property on the modified terms of sale.

Then here is a sale made on one set of terms advertised, and another set of terms announced at the sale, for Hooff says he sold on the terms as altered on the 5th of September, and

nothing done by Mrs. Ladd to waive the one month's advertisement of the new terms.

For her meeting Hooff on the day of sale (not time of sale, which was 12 o'clock per the advertisement), on the premises and conversing with him, and suggesting that addition (which, however, does not appear in the record) to the description of the property "then about" to be offered for sale, would not prove that Mrs. Ladd waived the due notice, unless it was proved that she knew the sale was then to take place.

Then it is clear that Hooff advertised the wharf clear of encumbrances, and sold it subject to an encumbrance as avowed at the time of sale, and there is nothing to prove that Mrs. Ladd agreed to waive the advertisement, as required in her deed of trust.

Was that a fair and legal sale?

And have the purchasers any standing in equity?

If a trustee sells in violation of the injunctions in his deed of
*22] trust, the legal title passes at law, but in equity the *cestui que trust* has relief against the purchaser who has bought with constructive notice of the breach of trust, or non-compliance with the conditions. *Taylor* v. *King*, 6 Munf. (Va.), 366; 4 Cranch., 403; and 4 Munf. (Va.), 421; *Greenleaf* v. *Queen*, 1 Pet., 138, 145.

But do the circumstances thus detailed, namely, Mrs. Ladd's application to extend the credit payments, her request to divide the property for sale, and her conversing with the trustee Hooff on the premises on the day of sale,—do all these circumstances amount to fraud in bar of her equity?

We contend not.

Because fraud consists in the "*suppressio veri* or *suggestio falsi.*"

And there is no suppression by Mrs. Ladd of the fact that she had restricted her power by her marriage settlement. On the contrary, it is plainly recited in the deed to Hooff, who knew it well, and his purchasers were equally bound to know the recitals in the deed to their vendor. See 2 Tucker's Bl. Com., 439, 442.

Finally, if we have succeeded in demonstrating that this married woman had no power to convey except *modo et forma*, then we deny that her fraud can confer such a power on her.

For when a feme covert had no power to convey by anticipation, it was held that her fraud could not operate so as to give such a power. *Jackson* v. *Hobhouse*, 2 Meriv., 488.

Then, if the settlement is relied on as conferring a power to appoint away this real estate, we have shown,—

1st. That it does not authorize such sweeping deposition.

2d. That what it does authorize has not been formally appointed or attempted to be.

3d. That as against this feme covert, under all the cases and all the circumstances, equity would not cure the defective execution.

And if there was a resulting separate equitable estate in Mrs. Ladd, with no power to alienate it in any mode, we have shown, first, that the express power to appoint during coverture negatives all other powers; secondly, that in Virginia separate real estate can only be disposed of by deed, &c., with privy examination.

The next subject-matter is the turnpike stock. We show that the bank holds 80 shares, admitted to be part of the settled stock. We have already shown that it is defectively appointed. And if so, there is no pretence of fraud here, as touching the real estate.

It is true the Virginia decisions say that a simple settlement *of personal estate to separate use involves the *jus disponendi*, but that means where no special mode of disposition is expressed. See 3 Rand. (Va.), 377, 381, 392; 9 Leigh (Va.), 206, 207–221. [*23

In such cases, all the authorities concur, that the forms are restraints. Inasmuch, then, as the bank holds the legal title charged with our equity in these shares, we have a right to a decree, divesting them of the tortious title thus acquired, and an account of the back dividends.

And we also have a right to have a decree for the unsold portion of the property, under the prayers for special and general relief, and to an injunction against a sale of that and a reconveyance in trust.

If, then, we have rights in any or all this property, we have a right to have all these conveyances cancelled in equity 1 Story Eq., 9, 10, 12.

As Mrs. Ladd's title is but an equitable one, she must enforce her rights in chancery, as she has no remedy at law.

Part of the brief on behalf of the defendants was as follows.

The bill charges force and fraud,—the undue exercise of marital power, &c., &c., as the inducements that forced the complainant against her will, into the execution of the deed in trust to Hooff, subjecting a portion of her separate estate as collateral security, &c., &c.

All these charges are met and conclusively repelled in the answers of the defendants,—and are so left without a particle of evidence to countenance them; and positively discredited by every circumstance in the case.

The complainant's case is then left to rest upon certain technical objections to the said deed in trust, for supposed departures from limitations imposed by the settlement on her, the complainant's, own rights in her own separate estate.

The following objections to that instrument are insisted on.

Objection 1. Attestation defective, in not specifying the act of signing as one of the acts attested.

Answer 1. The attestation, coupled, as it ought to be, with the conclusion of the deed, stating its execution under the hands and seals of the parties, is a sufficient attestation to the signing.

Answer 2. No distinct attestation to the signature necessary.

Against the reason and authority of the adjudications which, within the last thirty-six years seem to have upheld the objection, contrary to all the best of precedent opinions, and to have overruled our answers to it, see Sugden on Powers, 6th ed., ch. 6, § 4, pp. 284–325, and the authorities there reviewed and *criticised; *Pollock* v. *Glassell*, 2 Gratt. (Va.), 440, and the authorities there cited and reviewed, &c., &c.; *Langhorne* v. *Hobson*, 4 Leigh (Va.), 224; *Tod* v. *Baylor*, Id., 498; *Parks* v. *Hewlett*, 9 Leigh, 511; *Hume* v. *Hord*, 5 Gratt. (Va.), 374; *Lessee of Fosdick* v. *Risk*, 15 Ohio, 84; Lord Mansfield's opinion in *Wright* v. *Wakeford*, reported in the Appendix, No. 6, to Sugd. on Pow., ed. 1823.

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Answer 3. Even if the marriage settlement directed the writing to be signed, and the signature to be distinctly attested, that direction is not restrictive, and in no sort avoids the deed.

1st. Because the words of the settlement, if they call for Mrs. Ladd's signature, and for the attestation of three witnesses to her signature, are merely directory, and do not necessarily exclude any other form of alienation competent to an ordinary proprietor and bargainer.

2d. Because Mrs. Ladd was in the nature of a feme sole, whose *jus disponendi* is not restricted to the mode of alienation or appointment directed in the settlement; the settlement not purporting to negative every other mode. 1 Fonbl., ch. 2, § 6, pp. 96–101, notes *n*, *o*, *p*, *q*, and the authorities there cited; *Ewing* v. *Smith*, 3 Desaus. (S. C.), 417, and the authorities there cited and commented on; *Jaques* v. *Methodist Episc. Church*, 17 Johns. (N. Y.), 548, and the authorities there cited and explained; Sugd. on Pow., 6th ed., ch. 4, § 1, from p. 208 to the end of the section, the authorities there cited; 1 Serg. & R. (Pa.), 275; Clancy on Husb. & W. (ed. 1837), ch. 5 and 6; *Newlin* v. *Newlin*, 1 Serg. & R. (Pa.), 279; Story Eq. Jur. (ed. 1846), § 1390, and authorities there

referred to; *Field* v. *Sowle*, 4 Russ., 112; *Gardner* v. *Gardner*, 22 Wend. (N. Y.), 526; *Dallam* v. *Wampole*, 1 Pet. C. C., 116; *Vizonneau* v. *Pegram*, 2 Leigh (Va.), 188; Atherly on Mar. Set., 335; *Lee et al.* v. *Bank U. S.*, 9 Leigh (Va.), 200; manuscript case of *Woodson* v. *Perkins*.

Objection 2. The sealing and delivery of the deed by Mrs. Ladd is attested by only two witnesses, whereas the settlement called for three.

Answer 1. The objection rests on a mistake of fact; it is attested by three witnesses.

Answer 2. As a deed executed by her in her capacity of a feme sole as to her separate estate, and not restricted to the particular form of alienation directed by the settlement, no written attestation of witnesses appended to the deed was called for by the act of Assembly regulating conveyances; it is enough if the deed be proved to be her act by three witnesses before the proper court; and it is so proved.

*They need not be subscribing witnesses. Act of Assembly regulating conveyances; *Turner* v. *Stip*, 1 Wash. (Va.), 319; *Long* v. *Ramsay*, 1 Serg. & R. (Pa.), 72. [*25

Objection 3. That Mrs. Ladd ought to have been privily examined, pursuant to the Virginia act of Assembly.

Answer 1. It follows from the competency of Mrs. Ladd as a feme sole *sui juris*, in respect of her separate estate (as established by the authorities above cited), that to call for her privy examination as a feme covert would be contradictory and absurd.

Answer 2. That her acts disposing of her separate estate are effectual without privy examination, has been expressly and well settled, by authority. *Peacock* v. *Monk*, 2 Ves. Sr., 191; *Wright* v. *Cadogan*, 6 Bro. P. C., 486; *Barnes's Lessee* v. *Irwin*, 2 Dall., 199; *Doe* v. *Staple*, 2 T. R., 695; *Bradish* v. *Gibbs*, 3 Johns. (N. Y.) Ch., 523; Powell on Contr., 67; *Compton* v. *Collison*, 1 H. Bl., 334; *Rippon* v. *Dawding*, Ambler, 565; 1 Tuck. Bl., 115.

Objection 4. That Mrs. Ladd's *jus disponendi*, or power of appointment, was restricted to the annual interest, rents, and profits, and did not extend to the land itself.

Answer 1. The settlement extends, plainly and expressly, both to the land and to the rents and profits.

Answer 2. The land itself passed, *ex vi terminorum*, under the terms "all the interest, rents, and profits."

Devise of "issues and profits" of land, all one with a devise of the land itself. *Parker* v. *Plummer*, Cro. Eliz., 190.

So a devise of the "occupation and profits" of a house and park is a devise of the very house and park. *Paramour* v

Yardley, Plowd., 2d point, argued pages 541–543, decided p. 546.

No difference whether a devise of the land itself, or of the use, occupation, or profits of the land. Manning's case, 8 Co., 187.

"Rents and profits" means not annual rents and profits, but the estate itself. *Bootel* v. *Blundel*, 1 Meriv., 213, 232, 233; *Allan* v. *Backhouse*, 2 Ves. & B., 65.

Grant by deed of the "profits" of land to one and his heirs passes the whole land. Co. Lit., 4 *b*; 4 Com. Dig., *Grant*, E. 5; Clancy on Husband and Wife, ch. 6, pp. from 295 to 308, and cases there cited; *Barford* v. *Street*, 16 Ves., 135; *Jaques* v. *Methodist Episcopal Church*, 17 Johns. (N. Y.), 548, and cases there cited; Roper on Husband and Wife, 136, and cases there collected. The expression "from time to time," *26] will not prevent the wife from making a sweeping appointment. *Pybus* v. **Smith*, 3 Bro. Ch. C., 346; 2 Story, Eq. Jur., §§ 1393–1395; Virginia Rev. Co. (ed. 1803), p. 159, § 12.

But supposing the execution of the power of appointment defective in strictly legal requisites, a court of equity would leave her to her strictly legal remedy, and not help her to an unconscionable advantage; but, on the contrary, would actively interpose to relieve the purchaser or mortgagee, and compel the feme covert or infant to do equity.

Under the circumstances of this case, it would be against conscience, and fraudulent, for the complainant to take advantage of the alleged defects in the deed.

And married women, as well as infants, are barred by their own frauds.

It is a fraud to object to the sale or mortgage of their property, after it has been consummated with their assent, express or implied.

Their assent is implied, if they stand by and see their property disposed of, without instantly asserting their right, and notifying the party interested.

Any knowledge of the act whereby their rights are affected, is a "standing by," if they have opportunity to assert their right, &c., and covinously neglect it.

Littleton, § 678; Co. Lit., 357 *a*, 357 *b*, and 35 *a*. Feme covert's rights are choked and suffocated by her silent acquiescence, even though her covin be united with that of her husband.

Savage v. *Foster*, 9 Mod., 35, 37; 1 Rob. (La.), 244. Married women are as much bound as their husbands to be honest;—equally necessary for them to come with clean

hands into a court of equity. *Braxton* v. *Lee's Heirs*, 4 Hen. & M. (Va.), 376–383; *Engle* v. *Burns*, 5 Call (Va.), 463; *Evans* v. *Bicknell*, 6 Ves., 174–193; *Morrison* v. *Morrison*, 2 Dana (Ky.), 16.

Even were the deed in trust to Hooff defective, a court of equity would lend its aid in favor of a creditor. 1 Story, Eq. Jur., §§ 95, 96, 97, 169, 170, and cases there cited. A feme covert may bind her separate property, for her own or husband's debts, and will be held to a specific performance of her contract. 2 Story, Eq. Jur., §§ 1399, 1399 *a*, 1340, and cases there cited; *Hulme* v. *Tenant*, 1 Bro. C. C., 14, and notes; *Owen* v. *Dickerson*, 1 Craig & P., 46; *Allan* v. *Papworth*, 1 Ves. Sr., 163; 3 Johns. (N. Y.) Ch., 144.

The complainant is estopped, by her deed in trust to Hooff, from now attempting to claim the property. *Shaw* v. *Clements*, 1 Call (Va.), 381, top p.; *Danforth* v. *Murray*, 12 Johns. (N. Y.), 201; *Stevens* v. *Stevens*, 13 Id. (N. Y.), 316; *Jackson* v. *Bull*, 1 Johns. (N. Y.) Cas., 90; *Jackson* v. *Hoffman*, 9 Conn., 271; Heth, Cocke and Wife, 1 Rawle (Pa.), 344.

As to the right of the bank to hold road stock, *Jervis* v. *Rogers*, 13 Mass., 105; S. C., 15 Id., 389; *Union Bank of Georgetown* v. *Laird*, 2 Wheat., 390; *Elder* v. *Rouse*, 15 Wend. (N. Y.), 208; *Chesslyn* v. *Smith*, 8 Ves., 188.

Mr. Justice DANIEL delivered the opinion of the court.

The important legal questions arising upon this record, and on which the decision of the cause must depend, appear to be these:—

1st. The nature and extent of the estate embraced within the power reserved to the feme by the marriage settlement; viz., whether that power comprised as well real as personal estate, or was limited to interest, rents, and profits merely, and by name.

2d. The mode of appointment indicated by the marriage contract, and whether this mode has been shown to have been either strictly or substantially and fairly complied with in the requisites of signing, sealing, and attestation.

Before proceeding to a particular examination of the questions above stated, it may be proper to premise some observations with respect to the charges in the bill; and first, of undue marital influence, and secondly, of fraud as means employed in accomplishing the wrongs to which the complainant alleges she has been subjected, and against which she has sought relief. With regard to the first of these alleged means, it must be remarked, that no certain or specific mode or act, neither coercion, allurement, nor willful misrepresenta-

tion or falsehood, is charged, by which the free will, the judgment, or the inclination of the complainant has been restrained or misled. Every feme covert is presumed, under a settlement like the one in the present case, to be to some extent a free agent; and she must or ought to be presumed to entertain dispositions of kindness towards her husband. But if, in the indulgence of such dispositions, she should make an unlucky or unprofitable appointment, it would be carrying the principle of protection to an extreme destructive of every conception of free agency, to determine that these untoward results were in themselves proofs of undue marital influence. The husband does not answer the bill in this case, and there is no direct evidence introduced to sustain this charge as to him; but some of the facts in the testimony go very far to
*28] contradict this allegation,—as, for instance, the conduct of the feme, manifested and repeated *long after the separation from her husband had at any rate exempted her from any influence his presence and immediate agency might have been supposed to exert. This same conduct of the feme, her positive coöperation in the arrangements for the sale of the property, and her acquiescence in that sale until after the title had been made to the purchaser, furnish such presumption of the absence of fraud in the transactions complained of, which, if it is not absolutely conclusive, certainly calls for contravening evidence of a direct and powerful character,—evidence of force sufficient to overthrow and set aside the complainant's own acts and declarations. But independently of the facts and circumstances just adverted to, the positive denial of fraud in every answer in the cause, and the absence of any proof to sustain it, should alone be taken as a complete refutation of the charge.

We will now particularly consider the nature and extent of the estate reserved to the complainant by the marriage settlement, and which was embraced within her power to appoint, by a just construction of that instrument. It is alleged in the bill, that this estate was limited to interest, as synonymous with income, rents, and profits, *eo nomine*, and did not extend to the fee of the real estate, nor to the principal of the stock settled to the uses of the marriage. By every sound rule of construction, an instrument should be interpreted by the context, so as if possible to give a sensible meaning and effect to all its provisions; and so as to avoid rendering portions of it contradictory and inoperative, by giving effect to some clauses to the exclusion of others. Expounded by this rule, let us see what will be the character of the estate here limited to

the wife, and what the extent of her power to appoint in relation thereto.

The deed of settlement begins by reciting, "that, whereas the said Harriet V. Nicoll is now possessed of a considerable real and personal estate, which it has been agreed should be settled to her sole and separate use, with power to dispose of the same by appointment or devise." The deed then sets forth the estate, real and personal, conveyed by it, and enumerates the trusts created thereby, and amongst them the one involved in this controversy, and differently interpreted by the parties thereto, as follows, viz.: that the trustee "shall and do permit the said Harriet V. Nicoll, the intended wife, to have, receive, take, and enjoy all the interest, rents and profits of the property hereby conveyed, to and for her own use and benefit; or to the use of such person or persons, and in such parts and proportions, as she, the said Harriet V. Nicoll, shall from time to time during the coverture, by writing, appoint, &c., or to such person or *persons as [*29 she by her last will and testament, &c., may devise or will the same to; and in default of such appointment and devise, then the estate and premises aforesaid to go to those who may be entitled thereto by legal distribution."

Let it be here remarked, that the object of the deed is declared to be the settlement of the whole of the estate, real and personal, upon the married woman, with power to dispose of the whole of it, either by appointment or devise. It will not be denied that this investment of, and authority over, the whole estate, so explicitly declared, might not have been modified or even revoked by subsequent provisions of the same instrument; but certainly they should be made to yield only to declarations equally explicit, or to such as are absolutely contradictory to and irreconcilable with them. Can it be correctly affirmed of the subsequent and specific designation of the trusts in this deed, that they are either plainly contradictory, or irreconcilable with the purposes of the settlement previously and so explicitly declared? May not the term interest, contained in that enumeration, considered in its relative collocation to the terms rents and profits, be understood as equivalent with the word estate, especially when the terms rents and profits may be correctly taken to cover interest understood as mere revenue, and still more especially when we keep in view the previous purpose set forth in the deed,—that of settling on the feme, and subjecting to her disposition by deed or will, the whole of her estate, real and personal? Certainly there is nothing in the term interest incompatible with the meaning of the terms estate or property, for in an

ordinary as well as in a technical acceptation, interest may imply both estate and property. But there is another illustration of this matter which would seem to put it beyond farther doubt, that the power of appointment in question cannot by any rational construction be restricted to interest understood as revenue or money, or to rents and profits *eis nominibus*. Let it be again remarked, that, by the preceding part of the marriage contract, all the estate, real and personal, was settled to the feme, with power to appoint the whole, without exception, by deed or will. Then, after the words which it is insisted for the complainant restricted her power, we have, at the conclusion of the deed, these words:—"and in default of such appointment or devise, then the estate and premises aforesaid to go to those who may be entitled thereto by legal distribution." Now the construction which would restrict her power to interest, rents, and profits, would seem as if intended to make the fee or inheritance dependent upon
*30] the contingency of an appointment of these mere chattel interests by the feme;—if *she fail to appoint these, which alone it is insisted she had power to appoint, then, as a condition or consequence, "the estate and premises aforesaid" to go to those who may be entitled thereto by distribution. Let it be supposed that, being thus restricted, she does appoint these chattel interests; what then becomes of the inheritance or fee? The feme cannot, according to the argument, control or appoint it either by deed or will; this, it is said, is beyond her power. Does it not in this aspect of the case descend, or become subject to distribution, precisely as it was to do as the condition of non-appointment? So that, whether she appoints or not, the fee or inheritance goes precisely the same way. This construction renders the provisions of the marriage contract useless and unmeaning. It contemplates on the part of the wife an action wholly nugatory as to the ultimate disposition of the fee, which it places entirely beyond her control either by deed or by will, and leaves it to pass according to the law of inheritance whether she be active or quiescent. This confusion and obscurity in the construction of the contract is removed by taking the context,—by connecting the first clear and positive declaration of its objects, viz., the settlement on the feme of all her real and personal estate, and the power in her to appoint the same by deed or will, with the concluding provision of that contract, which declares that, in default of appointment or devise, "then all the estate and premises aforesaid," covering the whole deed; not the interest on money, not the dividends on stocks, nor profits of any kind, but the whole estate conveyed and settled, shall go to

those who may be entitled thereto by legal distribution. This construction gives consistency and meaning to the entire contract, and satisfies us that the power of appointment reserved to the wife was coextensive with the whole estate and subjects of the settlement.

It remains next to be considered whether the mode of appointment prescribed or indicated by the marriage contract, whether the power be construed in an extended or restricted sense, has been strictly or fairly and substantially complied with. On behalf of the appellant it is insisted, that, in the deed of the 9th day of October, 1827, from John H. Ladd, the trustee in the marriage settlement, and Harriet V. Ladd, to John Hooff, as trustee for the Farmers' Bank of Alexandria, regarding that deed as an appointment by Mrs. Ladd, under a competent power, still in its execution there has been such a departure from the mode prescribed for the exercise of the power by Mrs. Ladd, as renders her act wholly inoperative and void. The marriage contract, after securing the property *settled to the use of the wife, proceeds [*31 thus:—"or to the use of such person or persons, and in such parts and proportions, as she, the said Harriet V. Nicoll, shall appoint from time to time, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses." The deed to Hooff, it will be seen, after reciting that John H. Ladd, the trustee in the marriage contract, in execution of the trusts expressed and declared in the marriage contract, and for a pecuniary consideration, does grant, bargain, and sell to Hooff; and, after farther recital that "the said Harriet V. Ladd, in execution of the power of appointment to her reserved in the settlement, does hereby direct and appoint the premises hereinbefore described to be held by the said John Hooff and his heirs on the uses and for the purposes and trusts before recited," concludes in the following language:—"In witness whereof, the said John H. Ladd, Harriet V. Ladd, and John Hooff, have hereunto set their hands and seals the day and year first before written." Then, after the names and seals of the parties, are written, in the usual place of attestation, these words:—"Sealed and delivered in presence of George C. Kring, John McCobb, Matthias Snyder, Charles Muncaster, Jonathan Field."

Upon this state of facts, it has been contended that the execution of the power was defective and null, inasmuch as the power could be executed only by an instrument under the *hand and seal* of the married woman, and that the attestation of the witnesses shows simply *a sealing and delivery* of the deed of appointment, and shows nothing in relation *to the*

signing by the parties. Some objection was made in the argument, founded upon the relative position of the names of the attesting witnesses, as tending to produce uncertainty as to which of the parties the witnesses meant to testify; but this objection, whether or not under other circumstances it might have been of any importance, was obviated by an exhibition in court of the original deed, which it was admitted was the document before the court below in the trial of this cause. In considering this objection to the defective attestation of the instrument of appointment, it is to be observed that the complainant, by her bill, does not impeach the deed on any such ground; on the contrary, she expressly alleges that this deed was *signed* and executed by all the parties thereto, and witnessed by the four persons whose names appear thereon. Such being the state of facts, it may very properly be questioned whether a party admitting and averring the execution of an instrument, and impeaching only its fairness
*32] or its legal operation, exhibiting nothing in the state *of the pleadings requiring his adversary to establish the *execution* of such instrument, can, even in the court of original cognizance, be permitted to deny or question at the trial the existence or execution of the document against his own averment or admission. Such a proceeding would be a surprise in the court below; but it would be still more so if, after the trial, and without even an exception indorsed upon the document, it could be objected to before an appellate tribunal. There is no exception taken to the form or attestation of this deed of appointment found in the record before us. But was there not proof of the full execution of this power, inclusive of signing, according to approved legal intendment? One of the earliest cases, perhaps the earliest, going directly to sustain the exception here urged to the execution of the power, is that of *Wright* v. *Wakeford*, 17 Ves., 454. In that case, as in the one before us, the contract creating the power directed the appointment to be made by writing or writings *under hand and seal;* and in that case as in this, the memorandum of attestation was in the words "sealed and delivered," omitting to assert in terms the signature by the maker. Lord Eldon forbore to decide whether this certificate or memorandum embraced the signing as well as the sealing and delivery of the instrument, and sent the case to the Common Pleas, who certified (three of the justices, Heath, Lawrence, and Chambre, concurring against the opinion of Mansfield, C. J.), that in their opinion the power had not been well pursued.

After *Wright* v. *Wakeford*, followed the cases of *Doe d.*

Mansfield v. *Peach*, 2 Mau. & Sel., 576; *Wright* v. *Barlow*, 8 Id., 512; *Doe d. Hotchkiss* v. *Pearce*, 6 Taunt., 402. These cases rest upon *Wright* v. *Wakeford*, and some, if not all, of them refer to it expressly as their foundation. But, even contemporaneously with the cases just mentioned, it will be perceived that the courts have in some instances sought to free themselves from these literal trammels of *Wright* v. *Wakeford*, as too narrow to comprise the principles of justice and common sense; for as early as 7 Taunt., 355, in the case of *Moodie* v. *Reed*, which was sent from the Chancery, the will was attested in this general phrase, "witness, &c.," by two witnesses. In the testimonium clause the testatrix says, "These bequests are *signed* by me." Gibbs, C. J., said that this was clearly a good attestation of the signing. Still later, it has been ruled in several cases where the power required a will signed and *published* in presence of three witnesses, that the attestation was good expressing the will to have been signed and *delivered*. The *evident disposition of the [*33 courts being to adopt the reason and substance of the transaction, they have, as matter of construction, determined that delivery was publication. See 4 Sim., 558; 5 Id., 118.

But whatever doubt may heretofore have overhung and perplexed this matter, that doubt, so far as the reasonings of the English bench should shed light upon the judicial mind of our country, ought to be cleared away. This effect, we think, should be produced by the arguments in the House of Lords of the assembled judges in the case of *Burdett* v. *Spilsbury* reported in 6 Mann. & G., beginning at p. 386. In this case, presenting, as of course, an exhibition of great ability and learning, the execution and attestation of appointments under powers are the subjects considered. The cases from *Wright* v. *Wakeford* down, involving any important principle, are reviewed, and these subjects placed upon the basis of common sense. It is true that the facts in the case of *Burdett* v. *Spilsbury* were not precisely those of *Wright* v. *Wakeford*, the attestation clause in the latter being special and that in the former case not special; yet in the examination of the latter case, and of those which have followed and been rested upon it, their doctrines are discussed and by a majority of the judges disapproved, several of the judges who conceived themselves constrained to support *Wright* v. *Wakeford*, upon the maxim *stare decisis*, expressing their regret at the obligation supposed to be binding upon them, and declaring that, were the case *res integra*, they should certainly reject its doctrines. The extended views of the judges in *Burdett* v. *Spilsbury* cannot be given consistently with the limits of this opinion, yet some

of their illustrations of the principles they maintain may properly be adverted to. And it will be perceived that the substance and meaning of those principles are comprised in the following positions:—

1st. That the terms and modes prescribed in settlements for the execution of powers should be followed in reason and substance, so as to insure the purposes and objects contemplated by such settlements, and so as to prevent them from being sacrificed to mere literal severity of construction.

2d. That the memorandum of attestation to a deed or will, whether that memorandum be general or special, is not conclusive as to the ceremony of the execution of the instrument to which such memorandum is annexed, but may be explained by the testimony of the witnesses themselves, or by reference to the testimonium clause of the instrument, as showing the facts and circumstances set forth in that clause, and which the witnesses were called on to attest.

*34] *Thus in the case of *Burdett* v. *Spilsbury*, p. 392, Wightman, Justice, says,—"The power requires that the instrument shall be signed, sealed, and published by the testatrix in the presence of three witnesses, and that they *shall attest* the instrument. No form of attestation would for the first thirty years have dispensed with the necessity of calling one of the subscribing witnesses, if any were alive, to prove that the formalities required by the power had been complied with; but after thirty years, the case would rest upon the presumption arising from the production of the instrument itself. In the present case, the instrument shows a general attestation of it by three witnesses, without any statement of the particular facts they attested: but they must be understood to have attested something; and to ascertain what that is, there is no principle of law, nor any authority of which I am aware, that prohibits a reference to the instrument itself; and if we look at the instrument for information as to that which it is to be presumed the witness did attest or witness, what do we find? Upon the face of the instrument which the witnesses attest, the testatrix says, I do publish and declare this to be my last will and testament. In witness whereof I have set my hand and seal to this my last will and testament,—and then follows a signature and seal purporting to be those of the testatrix. But supposing such a special form of attestation as that contended for had been adopted, it would not have varied the character of the evidence derived from the *terms of the instrument*, and the general attestation of the witnesses. It would but have raised a presumption for the jury that they did witness that which is stated in the attestation, subject to any

doubt that might be raised as to whether they really did witness that which is stated in the written attestation or not."

In the same case, Williams, Justice, says,—"Now the language of the power (as has been already mentioned) is, by her last will and testament, to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses. All this is found to have been done, and we are now to see whether, by ordinary and fair construction, neither forcing any interpretation in favor of it, nor wholly excluding any reasonable inference for the mere purpose of defeating what we know to have been rightly done, the requisites appear to have been complied with. And here it seems very important to attend particularly to the document itself. The will first contains the whole testamentary part; every disposition of the property is first fully made, and the will is therefore as to that, its principal object, complete. The rest regards the manner of *the execution. It is thus:— [*85 I declare this only to be my last will and testament. In witness whereof, I have to this my last will and testament, contained in one sheet, set my hand and seal. The testatrix signed this part twice, once after the above words, and again where her seal is affixed, and directly opposite to the latter is the word *witness*, and immediately under it are the names of the witnesses; and the question is whether it is to be understood that they attested, or, in other words, were witnesses to any thing; and if so, how much? And first it is to be asked, for what purpose was this testimonium clause (as it has been called) introduced, or rather added? Certainly not to explain or to qualify the will, or any part of it. To its provisions it has no allusion; but it respects the forms to be observed in the execution of the will, and that only. Why are we to suppose that the testatrix was ignorant of the terms, upon which alone her dispositions could be available? This, the language of the clause shows she did understand. The clause, therefore, having this object, we come to consider the purpose for which the witnesses are introduced, and I confess I cannot conceive it possible to understand the meaning of their presence, except to witness something. If it be said, and with truth, that the witnesses cannot be presumed to be cognizant of the contents of the will, because that is contrary to experience, it is surely contrary to the same experience to suppose, that, when the presence of the witnesses is to be accounted for only by their being brought there to witness something, certain ceremonies were performed, but that they saw nothing of them, and that, too, when the very language of the testimonium (I declare, &c.) imports that the testatrix

was making the declaration, not to the winds, but to persons to whom she might address herself,—who were there to see and hear. If, then, the witnesses must be understood to have attested something, I can see no possible reason for stopping short of the conclusion, that they attested everything which by the clause purports to have been done, that is, signing, sealing, and publication." Again by the same Justice, p. 438: "Now, in *Wright* v. *Wakeford*, the power required the consent of A and B, testified by writing or writings under their hands and seals, attested by two or more credible witnesses. The attestation clause is sealed and delivered by the within-named A and B, in the presence of C. B. and G. B. Here the ceremony of signing was omitted in an attestation which professed to give an account of what had been done, and there was not, as in the present case, a testimonium clause."

*86] In speaking of *Wright* v. *Wakeford*, Gurney, Baron, remarks,—* "It is impossible to mention the names of Lord Eldon and the three other judges of the Common Pleas, Heath, Lawrence, and Chambre, otherwise than in terms of great respect. Nevertheless, with all the respect which is due to their authority, I cannot but think it most unfortunate that this decision was ever made. It has led to great injustice. It has disappointed the just expectations of sellers and devisors, and involved the courts in great difficulties." So, too, Lord Brougham, p. 466:—"I hardly know a case which has excited, at different times, more remark than *Wright* v. *Wakeford*. It has been again and again questioned, it has again and again been criticised, by the learned judges. It cannot, therefore, be said to have been at any time a case that commanded anything like the entire concurrence of Westminster Hall."

The reasoning of Tindal, C. J., in *Burdett* v. *Spilsbury*, applies with great force and clearness to the question before us. "If," says this judge, "the word 'witness' is taken abstractedly by itself, as constituting the whole of the attestation, I can see no objection to holding that the three persons whose names are subjoined to it must be taken to be witnesses to all that was actually done at the time, which is found by the special verdict to be all that was required to be done. Or, if the word *witness* is to be construed with reference to the statement immediately preceding it at the end of the will, then the word *witness* necessarily implies that the testatrix did in their presence declare the instrument to be her will, and that she did in their presence put her hand and seal thereto, that is, in the language of the settlement, that she *signed, sealed, and published it* in the presence of these three witnesses. To this construction an objection was taken at your

Lordship's bar, which has also been relied upon by some of the learned judges who delivered their opinions before me; viz., that it proceeds upon the supposition, that the whole instrument may legally be read together to explain the meaning of the word *witness*, and that it supposes the witnesses are conusant of the contents of the instrument, neither of which can be supposed. But I cannot feel the force of this objection. There has been, from the earliest time at which deeds were known, a marked and acknowledged distinction between the operative part of the deed itself, and the *testimonium clause* (as it is called) at the end of the deed. The essential part of the deed is that part, and that only, which contains the grant. The clause at the end is introduced, not as constituting any part of the deed, but merely to preserve the evidence of the due execution of it. Admitting, therefore, the deed itself is matter which may be held to be [*37
*confined to the knowledge of the parties, namely, the grantor and grantee, the testimonium clause is expressly introduced into it for the use of the public and the witness to the deed. It is well known that a similar clause was constantly inserted in old deeds and charters, at the close thereof, beginning with the words *hiis testibus*, and thence generally called the *hiis testibus* clause, in which the names of the persons present, who heard the deed read by the clerk, were written, not by themselves, but by the clerk who prepared the deed. Spelman in his Glossary, p. 228, traces out the variations in the form of the clause, at different periods of our history; and Madox in the Defrutation prefixed to his *Formulare Anglicanum*, goes more fully into the matter, and in the work itself gives numerous instances which it is impossible to read without being satisfied that the sense requires that the witnesses, whose names are inserted in the *hiis testibus* clause, must of necessity have known the words preceding it, or in fact they would have witnessed nothing at all. Take for example among many, that numbered 312,—And that this my gift, grant, and confirmation may remain firm for ever, I have confirmed this present charter with the impression of my seal, *hiis testibus*, &c. Who can doubt for a moment that these witnesses either actually read, or heard read over to them, the words of the deed immediately preceding their names, and that the introduction of the preceding clause had no other object or purpose? And this practice continued down to the reign of Henry VIII., as appears by the authority of Lord Cocke, who states the practice then began of separating the attestation from the deed itself, and for the witnesses to subscribe their own names to it, either at the bottom of, or indorsed

upon, it. But that the clause *in cujus rei testimonium*, so long as it was found at the close of the deed itself, never formed part of the deed itself, is evident from Shepard's Touchstone, where he says:—'A deed is good, albeit these words in the close thereof, *in cujus rei testimonium sigillum meum apposui*, be omitted,'—citing authorities which show that it is no more in fact than what it imports to be, the very attestation of the deed which has preceded it. There is therefore no reason why the word *witness*, written immediately after this testimonium clause, should not be considered as incorporated with it, and as calling the attention of the witnesses to all that had preceded in the testimonium clause." Again it is said by the same judge, p. 459,—"So far from its being a rule of law that you may not, in the attestation of a deed, look back to that which is found at the close of the deed itself, that, on the contrary, in most of the cases which have been relied on by the defendant in error, express reference has been made to the close of the deed itself."

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A quotation from the opinion of Lord Campbell will close these extracts from the opinions in *Burdett* v. *Spilsbury*, protracted, perhaps, beyond what even this interesting case will warrant. His Lordship says, p. 467,—"My Lords, in this case the only question is, whether the will was attested by three credible witnesses." He proceeds, p. 468,—"My Lords, independently of authority, I cannot doubt that for a moment. The only objection that can be made is this, that the will upon the face of it does not contain any process verbal or history of the transaction. But the power imposes no such condition,—it does not say a will, signed, sealed, and published in the presence of three witnesses and attested by them, *and a will containing a history of the solemnity*,—there are no such words in the power." Again, p. 469,—"If it were necessary, my Lords, I think the testimonium clause here might be resorted to, both upon principle and authority." These reasonings of the English judges, going to show that, upon principle, and independently of recent statutory provisions, the memorandum of attestation, so far from being conclusive upon the facts of *signing*, *sealing*, and publishing or delivering an instrument, may itself be controlled, either by the examination of the witnesses themselves, or by reference to the testimonium clause of such instruments, are fully sustained, and even more than sustained, by the authority of the supreme court of that state from whose jurisprudence and policy this controversy might be supposed in some degree to take its complexion. If, therefore, the most express adjudication of the Court of Appeals of Virginia can govern this

case, it seems at once disembarrassed of the objections alleged to the execution of the power created by the marriage contract.

The recent decision in the case of *Pollock and wife* v. *Glassel*, reported in 2 Gratt. (Va.), 439, would seem to be decisive of the questions now before us, that case having clearly ruled as the law of Virginia with regard to a deed, that, although the distinctive character of the instrument is to be determined by its intrinsic evidence, the question is still open whether it be the deed of the *party*, and that must be decided by evidence *aliunde*. If by plea of *non est factum*, or other proper denial, the fact that the paper was sealed by the party be put in issue, then it must be proved by competent and satisfactory testimony. In Virginia, by long usage, which has received the sanction of a statute, a scroll is used by way of a seal. The decisions have required that the substitution of the scroll for a *seal shall be recognized on the face of the deed, [*39
but in no case has it been held that, in the absence of such recognition, evidence is inadmissible to prove that in fact the scroll was affixed to the instrument with intent that it should stand in place of a seal. In the case above referred to, it is said by the court,—"Here the question occurs in a court of probate, whose province it is to examine the subscribing witnesses, and, if their testimony is satisfactory, to establish and perpetuate the due execution of the instrument. Upon what principle or authority are the subscribing witnesses to be estopped, because of some informality in the paper, from proving the fact, that it was sealed by the testatrix, or, what is the same thing, that she adopted the scroll affixed to it by way of seal?—In the much stronger case of a deed, there could be no such estoppel in a court of probate." In the same case the court say, through *Baldwin*, Justice,—"It will be seen that the statute requires the will to be *attested* by the witnesses, but does not prescribe what, nor that any, facts shall be stated in their attestation. I think it plain, that the legislature meant nothing more, than that the instrument itself should be attested, in order to identify the witnesses and designate who are to prove its execution. The object was not to obtain from the witnesses a certificate of the essential facts of the transaction, but to provide the means of proving them by persons entitled to confidence, and selected for the purpose. The subscription of their names denotes that they were present at and prepared to prove the due execution of the instrument so attested, and nothing more. The attestation is the act of the witnesses, and it was not intended to confide to them the duty of stamping their testimony upon the paper; which would avail nothing as evi-

dence, however perfect, and which ought to create no estoppel, however imperfect. This view of the statutory provision is in effect sustained by the English decisions." Again, page 465, it is said by the same judge,—"I think it clear that the subscription of the witnesses is substantially the attestation contemplated by the statute; and it is sufficient if the purpose be indicated by the briefest memorandum, or merely by a fair presumption arising from the local position of their signatures upon the paper; and whether a memorandum of attestation be general or special, it may be denied or contradicted by the subscribing witnesses, in the whole or in part, and of course is open to explanation if in any way ambiguous." The court then proceed to review the case of *Wright* v. *Wakeford*, and the cases of *Doe* v. *Peach*, *Wright* v. *Barlow*, and *Moodie* v. *Reid*, rejecting them as authority in the state of
*40] Virginia as to the form and influence *of the memorandum of attestation, and concurring with the doctrines declared by the majority of the judges in *Burdett* v. *Spilsbury*.

An objection has been made to the sale under the deed of trust, based upon the fact, that the portion of the property actually sold did not equal in value the whole amount of the debt due to the bank, which it is insisted should have been the case, according to the proviso in that deed. We do not see the force of this objection, inasmuch as, by the express terms of the deed, authority was given the trustee or the bank to sell the property in separate parcels, as either might deem it necessary or advisable; and it would have been impracticable before an experiment to ascertain *a priori* how much of the property would be requisite for the satisfaction of the debt, and thus a literal adherence to the proviso would lead either to the preventing a sale altogether, or to the sacrifice of the whole estate, whether there should have been a necessity for it or not. Moreover, the sale by parcel in this case was selected upon a calculation of advantage to the feme, and with her express approbation, with a view of saving to her, if practicable, a portion of the property.

Upon full consideration of the facts and the law of this case, the court are of the opinion, that the marriage contract gave power to the feme covert to appoint the entire estate and property embraced within it; that the provisions and conditions of that contract have been complied with in the execution of the power thereby created and reserved; that therefore the decree of the Circuit Court, dismissing the bill of the appellant, the complainant below, ought to be affirmed, and it is hereby accordingly affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

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*THE UNITED STATES, PLAINTIFFS, *v.* THOMAS STAATS, JUNIOR. [*41

Where an act of Congress declared, that, if any person "shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; every such person shall be deemed and adjudged guilty of felony," &c.—it was sufficient that the indictment charged the act to have been done "with intent to defraud the United States," without also charging that it was done feloniously, or with a "felonious intent."[1]

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[1] FOLLOWED. *People* v. *Colton*, 2 Utah T., 458.

An indictment for a statutory offence, which avers the offence as the statute defines it, is sufficient. All the circumstances which constitute the definition of the offence, as given in the statute, must be stated, but no others are required. *Phelps* v. *People*, 72 N. Y., 334, 349; *affirming* 6 Hun, 401.

It is not essential, in an indictment for a statutory offence, to employ the precise words of the statute; it is sufficient to state all the facts constituting the offence, so as to bring the accused precisely within the statutory provisions. *Eckhardt* v. *People*, 83 N. Y., 462; *affirming* 22 Hun, 525.

Where the indictment follows the precise words of the statute, neither the word "unlawful" or any other word showing a wrongful intent need be added. *United States* v. *Thompson*, 6 McLean, 56. Thus an indictment for setting fire to a ship at sea, which offence is made a felony by a statute, need not allege that the act was done *feloniously*. *United States* v. *McAvoy*, 4 Blatchf., 418; so of an indictment under a statute punishing assaults with dangerous weapons. *United States* v. *Lunt*, 1 Sprague, 311; *Same* v. *Herbert*, 5 Cranch, C. C., 87.

An indictment under Bat. (N. C.) Rev. ch. 32, for malicious mischief (killing domestic animals) must allege that the act was wilfully and unlawfully done, notwithstanding those words are not contained in the statutory definition of the offence. *State* v. *Simmons*, 78 N. C., 269; *State* v. *Hill*, 79 Id., 656; *State* v. *Parker*, 81 Id., 548. So, also, an indictment under a statute punishing the changing a record, must allege the intent, although the statute be silent upon that subject. *Harrington* v. *State*, 54 Miss., 490. And an indictment charging one as a common night-walker, must aver an unlawful motive or purpose. *Thomas* v. *State*, 55 Ala., 260.

Where the statute reads: "If any person shall mingle any poison" &c., the indictment need not allege that

Where the act done was the transmission to the Commissioner of Pensions of an affidavit which was false in the facts which it professed to narrate, although sworn to by a person who really existed, and the person who transmitted it knew that it was false, it was an offence within the meaning of the act of Congress." [2]

THIS case came up from the Circuit Court for the Northern District of New York, on a certificate of division in opinion between the judges thereof.

It was an indictment under the act of March 3d, 1823, entitled "An act for the punishment of frauds committed on the government of the United States." (3 Stat. at L., 771, 772.)

By the first section it is enacted,—"That if any person or persons shall falsely make, alter, forge, or counterfeit; or cause or procure to be falsely made, altered, forged, or counterfeited; or willingly aid or assist in the false making, altering, forging, or counterfeiting, any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive, from the United States, or any of their officers or agents, any sum or sums of money; or shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing as aforesaid, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; every such person shall be deemed and adjudged guilty of felony, and being thereof duly convicted, shall be sentenced to be imprisoned and kept at hard labor for a period not less than one year, nor more than ten years; or shall be imprisoned not exceeding five years, and fined not exceeding one thousand dollars."

*42] *The first count of the indictment charged that one David Goodhard was a claimant for a revolutionary pension, and did claim and receive the same; and that

the act was wilfully done; but where it reads: "If any person shall wilfully poison any spring" &c., the reverse is the rule. *Davis* v. *State*, 4 Tex. App., 456.

[2] REVIEWED. *United States* v. *Corbin*, 11 Fed. Rep., 240, 241.

"Thomas Staats, Jr.," contriving and intending to injure and defraud the said United States of America, and to cause and induce the said United States of America to pay unto the said David Goodhard divers large sums of money, did cause and procure to be transmitted to the Commissioner of Pensions of the said United States of America, and to be presented at the office of the said Commissioner, a certain writing, purporting to be made, subscribed, and sworn to by one Benjamin Chadsey. After setting forth the contents of the paper, it proceeded, that the said Staats, "knowing the said affidavit to be false and untrue," and that Benjamin Chadsey did not know what had been stated in the paper, "did transmit, and did cause and procure to be transmitted, to the said Commissioner of Pensions of the said United States of America, the said false writing and affidavit, as a true writing in support of the aforesaid claim of the said David Goodhard, with intent to defraud the United States of America."

The second count charged, that David Goodhard was a claimant for divers sums of money as a pensioner, and that in support of the said claim one William Bowsman did subscribe and make oath unto a certain affidavit therein mentioned; whereas, in truth, Bowsman did not know what was so set forth. "And the said Thomas Staats, Jr., well knowing the premises, and well knowing that the said affidavit or writing was false and untrue, * * did cause and procure to be transmitted and presented to the Commissioner of Pensions of the said United States of America, the said false and untrue affidavit or writing as a true writing, in support of the claim of the said David Goodhard, with intent to defraud the said United States of America."

The accused was found guilty. A motion was afterwards made to arrest the judgment upon the verdict, when the judges were opposed in opinion on the following questions:

1. Whether the said indictment is fatally defective for the reason that the acts charged to have been committed by the said defendant are not in said indictment charged to have been committed feloniously or with a felonious intent?

2. Whether the acts charged in the said indictment to have been committed by the defendant do constitute an offence within the provisions of the first section of the act of Congress, approved March 3d, 1823, entitled "An act for the punishment of frauds committed on the government of the United States"?

Mr. Johnson (Attorney-General), on the part of the [*43 United States, contended,—

1. That, in an indictment for such an offence as is stated in the indictment in this case, it is not necessary to charge that the acts were done feloniously. *United States* v. *Elliott*, 8 Mason, 156; *United States* v. *Gooding*, 12 Wheat., 460; *United States* v. *Lancaster*, 2 McLean, 431.

2. That the acts charged are an offence within the first section of the act.

Mr. Justice NELSON delivered the opinion of the court.

The prisoner was indicted under the third section of the act of Congress, passed 8d March, 1823, entitled "An act for the punishment of frauds committed on the government of the United States."

The section provides, that if any person shall falsely make, alter, forge, or counterfeit, &c., any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum or sums of money; or shall utter or publish as true, or cause to be uttered or published as true, any false, forged, altered or counterfeit deed, &c., with intent to defraud the United States, knowing the same to be false, forged, or counterfeit; or shall transmit to, or present at, or cause or procure to be transmitted to or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; every such person shall be deemed and adjudged guilty of felony, &c.

The indictment contains two counts. The first charges, that one David Goodhard was an applicant for a pension under the act of Congress entitled, "An act supplementary to the act for the relief of certain officers and soldiers of the Revolution," passed 7th June, 1832; and that Thomas Staats, Jr., the prisoner, contriving and intending to defraud the United States, and to cause and to induce the same to pay to the said David divers large sums of money, did cause and procure to be transmitted to the Commissioner of Pensions, and to be presented at the office of the said Commissioner, a certain writing purporting to be made, subscribed, and sworn to, by one Benjamin
*44] Chadsey, &c., in which said writing, it was alleged and declared, *(setting out the contents of the affidavit,) the said Thomas Staats, Jr., knowing the said affidavit to be false and untrue, &c., and did cause and procure to be trans-

mitted to the said Commissioner of Pensions the said false writing and affidavit, as a true writing, in support of the aforesaid application of the said David, with intent to defraud the United States.

The second count is substantially like the first, except that it avers the false affidavit to have been made by one William Bowsman.

The prisoner, on being arraigned, pleaded not guilty; and, on the trial of the issue, was convicted; whereupon his counsel moved in arrest of judgment; upon whose motion the following questions arose, upon which the opinions of the judges were opposed, and the questions certified to this court:—

1. Whether the said indictment is defective, for the reason, that the acts charged to have been committed by the defendant are not charged to have been committed feloniously, or with a felonious intent; and,

2. Whether the acts charged in the said indictment to have been committed by the defendant do constitute an offence within the provisions of the first section of the act of Congress above recited.

1. In respect to the first question certified. The general rule is, that the charge must be laid in the indictment so as to bring the case within the description of the offence as given in the statute, alleging distinctly all the essential requisites that constitute it. Nothing is to be left to implication or intendment. Generally speaking, it is sufficient to pursue the words of the act; but if, in pursuing them, there should be any ambiguity or uncertainty in charging the offence, the pleader should regard the substance and legal effect of the enactment. And when words or terms of art are used in the description, that have a technical meaning at common law, these should be followed, being the only terms to express in apt and legal language the nature and character of the crime.

In all cases of felonies at common law, and some, also, by statute, the felonious intent is deemed an essential ingredient in constituting the offence; and hence the indictment will be defective, even after verdict, unless the intent is averred. The rule has been adhered to with great strictness; and properly so, where this intent is a material element of the crime.

Sir William Blackstone observes, that the term *felony* originally denoted the penal consequences of the crime, namely, the forfeiture of the lands and goods; but that, by long use, it came, at last, to signify the actual crime committed.

*He further remarks, that the idea of felony is so generally connected with that of capital punishment, [*45

that it is difficult to separate them, and that the interpretation of the law conforms to that usage; and therefore, if a statute makes any new offence felony, the law implies that it shall be punished with death, that is, by hanging as well as by forfeiture, unless the offender prays the benefit of clergy. (4 Bl. Com., 97, Wend. ed.)

This view accounts for the necessity of the averment of a felonious intent in all indictments for felony at common law; and, also, in many cases when made so by statute; because, if it is used, in the sense of the law, to denote the actual crime itself, the felonious intent becomes an essential ingredient to constitute it. The term signifying the crime committed, and not the degree of punishment, the felonious intent is of the essence of the offence; as much so as the intent to maim, or disfigure, in the case of mayhem, or to defraud, in the case of forgery, are essential ingredients in constituting these several offences.

But, in cases where this felonious intent constitutes no part of the crime, that being complete, under the statute, without it, and depending upon another and different criminal intent, the rule can have no application in reason, however it may be upon authority.

The statute upon which the indictment in question is founded describes the several acts which make up the offence; and then declares the person to be guilty of felony, punishable by fine and imprisonment. The transmission or presentation of any deed, or other writing, to any office or officer of the government, in support of, or in relation to, any account or claim, with the intent to defraud the United States, knowing the same to be false, are the only essential ingredients. The felonious intent is no part of the description; as the offence is complete without it. Felony is the conclusion of law from the acts done with the intent described; and makes part of the punishment; as, in the eye of the common law, the prisoner thereby becomes infamous, and disfranchised. These consequences may not follow, legally speaking, in a government where the common law does not prevail; but the moral degradation attaches to the punishment actually inflicted.

This question arose in a case before Park, J., on the Northern Circuit, in 1831, on the trial of an indictment for burning stacks of grain, which is made felony by the 22 & 23 Car. II. The second count charges the prisoner with aiding and abetting; and an objection was taken, that the indictment should

*46] have averred that he was feloniously present aiding *and abetting. Park, J., was inclined to think the

objection fatal; but allowed the trial to proceed, and the prisoner was acquitted on the facts. *Canon and another's Case*, 1 Lewin's Northern Circuit, 227.

It again arose before Lord Lyndhurst, C. B., at the Durham Assizes, in 1884, on an indictment under the statute of mayhem, 9 Geo. IV., ch. 31, § 2. An objection was taken after conviction, that the indictment did not allege that the prisoner upon the prosecution feloniously did make an assault, &c.; but it was held that, as the indictment described the offence in the words or terms of the statute, it was sufficient. (Deacon on Cr. Law, Suppt. 1652, 1681, *Rex* v. *Thomas Liddle*.)

This statute, after describing the acts constituting the offence, concludes, like the one before us, that every such person shall be guilty of felony, and, on conviction, shall suffer death. The decision, therefore, bears directly upon the question in hand; and, as the principle seems to have been given up in the country from whence it was derived, and, at best, is here but the merest technicality, it is difficult to perceive any ground for still giving effect to it. It would be otherwise, if the felonious intent was descriptive of the offence, and not simply of the punishment.

We shall, therefore, direct that it be certified to the court below, that the indictment is not fatally defective, for the reason the acts charged to have been committed by the defendant are not charged to have been committed feloniously, or with a felonious intent.

2. With respect to the second question certified.

The court are of opinion that the offence charged in the indictment comes within the statute.

The only doubt that can be raised is, whether the writing transmitted or presented to the commissioner in support of the claim for a pension should not, within the meaning of the statute, be an instrument forged, or counterfeited, in the technical sense of the term; and not one genuine as to the execution, but false as it respects the facts embodied in it.

The instruments referred to in the first part of the section, the false making or forging of which, with the intent stated, is made an offence, probably are forged instruments in a strict technical sense; and there is force, therefore, in the argument, that the subsequent clause, making the transmission or presentation of deeds or other writings to an officer of the government a similar offence, had reference to the same description of instruments.

*But this is by no means a necessary conclusion upon the words of the statute. Indeed, upon this construc- [*47

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tion, it is not easy to see the materiality of the clause; because the uttering and publishing of the forged instruments mentioned in the first clause, as true, is made an offence, the same as the forging; and it is quite clear, that the acts provided against in the subsequent clause amount to an uttering and publishing. If restrained, therefore, to forged instruments, the clause would seem to be unnecessary.

The deeds and other writings mentioned are not connected with those in the preceding paragraph, as would have been natural, and almost of course, if intended to describe similar instruments. The language is "any deed, power of attorney," &c.; not, the aforesaid deed, which words must be in effect interpolated, upon the construction contended for.

The clause, therefore, may well be regarded as providing for a distinct and independent offence,—one essential to the protection of the government against fraudulent claims; and which consists in the transmission or presentation of false or counterfeit papers to any officers of the government in support of an account or claim, with intent to defraud.

The case is within the mischief intended to be guarded against; and, also, within the words; and we think the considerations urged, founded upon the form and structure of the general provision, though plausible, and calculated to excite doubts, not sufficient to take it out of them.

A genuine instrument containing a false statement of facts, used in support of a claim, the party knowing it to be false, and using it with the intent to defraud, presents a case not distinguishable in principle, or in turpitude, or in its mischievous effects, from one in which every part of the instrument is fabricated; and when the one is as fully within the words of the statute as the other, we may well suppose that it was intended to embrace it.

We shall direct, therefore, that it be certified to the court below, that the acts charged in the said instrument to have been committed by the defendant do constitute an offence within the provisions of the act above referred to.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and on the points and questions on which the judges of the said Circuit Court were
*48] opposed in opinion, and which were certified to this court for its *opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court,—

1st. That the indictment is not fatally defective for the reason the acts charged to have been committed by the defendant are not charged to have been committed feloniously, or with a felonious intent; and,

2d. That the acts charged in the said indictment to have been committed by the defendant do constitute an offence within the provisions of the first section of the act of Congress, approved March 3d, 1823, entitled "An act for the punishment of frauds committed on the government of the United States." Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

FRANCIS SURGETT, APELLANT, *v.* PETER M. LAPICE AND EDWARD WHITTLESEY.

Where an "action of jactitation" or "slander of title" was brought in a state court of Louisiana and removed into the Circuit Court of the United States by the defendant, who was a citizen of Mississippi (the persons who brought the action being in possession of the land under a legal title), and the defendant pleaded in reconvention, setting up an equitable title, and the court below decreed against the defendant, it was proper for him to bring the case to this court by appeal, and not by writ of error.[1]

This case distinguished from that of the *United States* v. *King*, 3d and 7th Howard, 773 and 844.

Before the transfer of Louisiana to the United States, the Spanish government was accustomed to grant lands fronting on the Mississippi River, and reserve the lands behind those thus granted for the use of the front proprietors, who had always a right of preëmption to them.

After the transfer, Congress recognized this right of preëmption by several laws.

In 1832, Congress passed an act (4 Stat. at L., 534) giving to the proprietors of any tracts bordering on a river, creek, bayou, or water-course, the right of preference in the purchase of any vacant tract of land adjacent to and back of his own tract, provided that the right of preëmption should not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water-course, and provided that all notices of claims shall be entered, and the money paid thereon, at least three weeks before such period as may be designated by the President of the United States for the public sale of the lands in the township.

The last proviso cannot be construed to apply to a township where the lands had already been exposed to sale by order of the President in 1829. The act having been passed in 1832, a compliance with it was impossible, and it must, therefore, be construed as applying prospectively to those lands which had not been exposed to public sale.

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[1] CITED. *Walker* v. *Dreville*, 12 How., 61; *Minor* v. *Tillotson*, Id., 392; *Brewster* v. *Wakefield*, 22 Id., 118; *Thompson* v. *Railroad Cos.*, 6 Wall., 134. See *McCollum* v. *Eager*, Wall., 442.

The first proviso related only to a river, creek, bayou, or water-course which was a navigable stream. The bayou in question was not so, as is shown by the evidence in the case, and also by the fact that the sections of land, as laid out by the public surveyor, cross it. When the surveyor comes to navigable streams, he bounds upon the shore, and makes fractional sections.

In order to bring land within the exception, it must be fit for cultivation, and also border on another river, &c. The circumstances are coupled together, and both must concur, or else the exception does not apply.

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana.

It was a possessory action in the sense of the Code of Practice of that state, originally commenced by Lapice and Whittlesey, in the Ninth District Court of the state of Louisiana, in and for the parish of Concordia, against Surgett, who was a citizen and resident of the state of Mississippi; and at whose request it was removed into the Circuit Court of the United States.

On the 21st of November, 1829, Surgett purchased several lots, from number 28 to number 35 inclusive, in township 5, range 9, east, in the Ouachita district in Louisiana, which lots fronted on the Mississippi River.

On the third Monday of November, 1829, the President of the United States issued a proclamation, offering the public lands in this township for sale.

On the 15th of June, 1832, Congress passed an act (4 Stat. at L., 584), entitled "An act to authorize the inhabitants of the state of Louisiana to enter the back lands." This act provided that every person who, by virtue of any title derived from the United States, owns a tract of land bordering on any river, creek, bayou, or water-course, in the said territory, and not exceeding in depth forty arpens, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of, his own tract, not exceeding forty arpens, French measure, in depth, nor in quantity of land that which is contained in his own tract, at the same price and on the same terms and conditions as are, or may be, provided by law for the other public lands in the said state, &c., &c. 1. Provided, however, that the right of pre-emption granted by this section shall not extend so far in depth as to include lands fit for cultivation, bordering on another river, creek, bayou, or water-course. And every person entitled to the benefit of this section shall, within three years after the date of this act, deliver to the register of the proper land office a notice, in writing, stating the situation and extent of the tract of land he wishes to purchase; and shall also make the payment or payments for the same, at the time and times which are or may be prescribed by law, for the dis-

posal of the other public lands in the said state, at the time of his delivering the notice aforesaid being considered as the date of the purchase. 2. Provided, also, that all notices of claims shall be entered, and the money paid thereon, at least three weeks before such period as *may be designated [*50 by the President of the United States, for the public sale of the lands in the township in which such claims may be situated, and all claims not so entered shall be liable to be sold as other public lands, &c. And if any such person shall fail to deliver such notice within the said period of three years, or to make such payment or payments at the time above mentioned, his right of preëmption shall cease and become void; and the land may thereafter be purchased by any other person, in the same manner and on the same terms, as are, or may be, provided by law for the sale of other public lands in the said state.

On the 14th of July, 1834, a part of the land lying back of the lots owned by Surgett was entered at the land office by Whittlesey and one Sparrow, whose interest was afterwards purchased by Lapice.

On the 24th of February, 1835, Congress passed another act (4 Stat. at L., 753), extending the time given by the former act to one year from the 15th of June next.

On the 17th of March, 1836, Whittlesey entered the remaining portion of the lands back of Surgett's lots.

On the 20th of May, 1836, Surgett made application to enter the lands in controversy, which had been taken up by Whittlesey and Sparrow, and by Whittlesey. At the same time, he made a tender of the purchase-money, which was refused by the receiver, in consequence of the following indorsement upon the application by the register:—

"By reference to the official township map, it will be seen that the land called for in the above application is such as is exempted from the right of back concession (so called) by the first proviso of the act under which the applicant claims, which reads, ('meaning the right to the back land,') shall not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water-course. Now, from the evidence in this office, the land embraced in the rear of the above lots or fractional sections is fronting on another bayou, and that the same is fit for cultivation, the fact of a part being good land, above or during high-water mark, is on file herewith. Under the circumstances of the case, the land called for in part has been entered by other persons as public land, subject to private entry, and the application is

rejected, so far as the action of this office can decide, subject to the decision of the department."

On the 10th of April, 1840, Lapice and Whittlesey filed a petition in the Ninth District Court of the state of Louisiana, *51] which is known by the laws of that state as an "action of *jactitation," or "slander of title." The petition "shows, that one Francis Surgett, residing in Adams county, in the state of Mississippi, has heretofore, at various times, and on divers occasions, slandered the title of your petitioners to the aforesaid tracts of land, and still continues to do so, by giving out in speeches and otherwise, and public proclaiming, that he the said Surgett is the rightful and true owner of said tracts of land, and not your petitioners; alleging that the said Whittlesey and Sparrow acquired from the United States no legal and valid right thereto, and threatening the said Sparrow and your petitioners with a suit to recover the same; that your petitioners and the said Sparrow, while part owners, have frequently requested said Surgett to desist from the slandering their title, or to bring suit to establish his own title thereto, if any he has; but he has refused, and still refuses, either to desist or to bring suit as requested; that said acts of the said Surgett have damaged your petitioners five hundred dollars."

The petition then prays, "That, after due proceedings had, the said Surgett be ordered to set forth his title to the tracts of land described in the aforesaid petition, if any he has, and establish it contradictorily with your petitioners; that unless he produces a good title paramount to your petitioners, that judgment be rendered in their favor, quieting them in their title and possession of said land, and that the said Surgett may be forever enjoined from setting up any claim or pretensions to the same; that your petitioners recover five hundred dollars damages against the said Surgett, and the costs of suit to be taxed, and for general relief in the premises, &c."

On the 10th of June, 1841, Surgett, being a citizen and resident of Mississippi, removed the cause to the Circuit Court of the United States for the District of Louisiana.

On the 3d of December, 1841, Surgett filed his answer, in which he denied altogether that the petitioners had any title to the lands, but claimed that the title was in himself. The answer then proceeds thus:—"Respondent pleads in reconvention that he himself is the true and lawful owner of so much of the said lands claimed by the plaintiffs, as are embraced in the aforesaid back concessions claimed by him, and prays that he may be decreed to be the legal owner thereof, that the certificates granted by the commissioners of the land

office to Sparrow and Whittlesey, or either of them, may be avoided and annulled; and that, if patents have already issued in their favor for said lands, the plaintiffs may be decreed to convey all their right, title, and interest, by virtue of said patents, to your respondent; that he may be quieted in his title and possession *thereof, and may recover [*52 judgment against said plaintiffs for the sum of one thousand dollars damages, sustained by him in consequence of their illegal pretensions, and for general relief in the premises."

Under commissions to take testimony, thirteen witnesses were examined, as to the nature and character of the bayou called Mill Bayou, in the rear of Surgett's lots. It is impossible to insert all this evidence.

On the 7th of April, 1845, the Circuit Court passed the following decree:—

"The court, having duly considered the law and the evidence in this case, doth now order, adjudge, and decree, that the plaintiffs Lapice and Whittlesey be quieted in their title to, and possession of, the land set forth and described in their petition, and that the defendant, Francis Surgett, be for ever enjoined from setting up any claims or pretensions to the same. It is further ordered, adjudged, and decreed, that the said defendant do pay the costs of this suit."

From this decree Surgett appealed to this court.

The case was argued by *Mr. Lawrence* and *Mr. Jones*, for the appellant, and *Mr. Brown* and *Mr. Johnson* (Attorney-General), for the appellee.

The points raised by the counsel for the respective parties were the following:—

For the appellant.

1. *As to jurisdiction.*

A motion has been made to dismiss this case for want of jurisdiction, because (it being an action at law, and not a suit or proceeding in equity) it should have been brought here by writ of error and not by appeal.

This was a petitory action originally commenced by the appellees in the State Court of Louisiana, in the manner authorized by the laws of that state, and removed at the instance of the appellant into the Circuit Court of the United States. It is known in the Louisiana Code as an "action of jactitation," or "slander of title," and may be brought by any one having a colorable title to, or possession of, land or other property, against any person claiming title to the same, to compel the latter to establish his title, or else to punish him for the

slander. If the fact of claiming title is denied, and no title is asserted, the trial is upon that issue alone, and would undoubtedly be a trial at law. But if the fact of the supposed slander is admitted, and the defendant sets forth his title, the original
*58] action is at an end; the answer becomes the ground of another *suit; the former defendant becomes the actor, the plaintiff, and the trial becomes one as to the respective titles of the parties to the thing in controversy. And it makes no difference, according to the Louisiana practice, whether the defendant in the suit for slander commences a new suit by petition founded on his title, or whether he does it by his answer in the same suit. In either case, it is in substance a new suit and another trial. *Livingston* v. *Hermann*, 9 Mart. (La.), 656, 700, 722; *Hewit* v. *Seaton et al.*, 14 La., 160; *Millaudon et al* v. *McDonough*, 18 Id., 106; *Proctor* v. *Richardson et al.*, 11 Id., 188.

When, however, the answer is made the groundwork of a new suit in the Circuit Court of the United States, where the distinction between suits at law and suits in equity is established, the character of the suit will be determined by the subject-matter and the general character of the proceedings. If the controversy is one appropriate exclusively to equity jurisdiction, and if the proceedings partake mostly of the character of equity proceedings, the suit is one in equity, so far at least as to entitle it to be brought up to this court by appeal rather than by writ of error. *McCollom* v. *Eager*, 2 How., 61; *Parish* v. *Ellis*, 16 Pet., 454; *Parsons* v. *Bedford et al.*, 3 Pet., 447.

The equity jurisdiction of the courts of the United States is the same in one state as in another and wholly independent of the local law of every state, without distinction.

Accordingly, the extension of a common law remedy to an equitable right, by the local law of any state, does not take away the equitable remedy proper to the courts of the United States. 1 Story Eq., §§ 57, 58; 3 Story on Const., 506, 507, 644, 645, and cases there cited.

The remedies in the courts of the United States must be at common law or in equity, not according to the practice of the state courts, but according to principles of common law or equity, as distinguished and defined in that country from which we derive our knowledge of those principles. *Robinson* v. *Campbell*, 3 Wheat., 222.

Being a case which, upon general principles, is a *peculium* of equity, its jurisdiction in the Circuit Courts of the United States was not taken away by a law of Massachusetts giving

the common law courts jurisdiction of the same matter. *United States* v. *Howland*, 4 Wheat., 115.

By parity of reason, in Pennsylvania the legal remedy by ejectment, although extended by state law and practice to equitable titles, cannot be sustained on such title in the Circuit Court of the United States in that state; but the plaintiff *must still show a paramount legal title. *Swayze* [*54
v. *Burke*, 12 Pet., 23. See *Vatier* v. *Hinde*, 7 Id., 274; *Golden* v. *Prince*, 3 Wash. C. C., 313; *Pratt* v. *Northam*, 5 Mason, 95.

All these principles have been extended and applied in their utmost latitude, and with additional illustrations, to Louisiana. See *Livingston* v. *Story*, 9 Pet., 655; S. C., 13 Id., 368; *Ex parte Poultney*, 12 Id., 474; *Ex parte Myra Clarke Whitney*, 13 Id., 404.

And see all these reviewed, and the doctrine reasserted, in *Gaines et ux.* v. *Relf et al.*, 15 Pet., 9; *Gordon* v. *Hobart*, 2 Sumn., 401.

Lastly, this court has decided, in effect, that the United States, in conferring chancery jurisdiction on the courts in Louisiana, have imposed no foreign law on the state, nor introduced any foreign or new principle of jurisprudence. The whole innovation went no further, in that state, than a mere change in the mode of obtaining a judicial end, for which the local law is there supposed to afford an adequate remedy in another form. *Gaines et ux.* v. *Relf, Chew, et al.*, 2 How., 650.

Although in Louisiana, as in many other of the United States, there are no distinct forums of law and equity, yet an equity jurisprudence (not materially distinguishable, either in its principles, in its practical ends, or in the means of accomplishing its ends, from that which other states have borrowed from the equity system of England) is incorporated with the general jurisprudence of the state, and is administered by the same courts and the same remedies.

Those remedies, in their practical forms, in their processes, and in their reach and effect, (though not precisely conformed in all respects to the rules of equity practice prescribed to the courts of the United States,) are fashioned after the same model as those of the equity side of the English Chancery styled the Forum Romanum; and are quite appropriate to all the most comprehensive heads of equity cognizable in the courts of the United States. Civil Code of Louisiana, Art. 21, 1958 to 1962, recognitions of equity *eo nomine*.

Actions whereby contracts, &c., may be set aside by the active interference of the court, (over and above the universal

right of defence on equitable grounds,) as effectually and extensively as by any form of procedure in any court of equity.

C. Code, Art. 1854 to 1874, 2567 to 2578, 2634 to 2636, Lesion; 2496 to 2518, Redhibition; 1841 to 1843, Nullity resulting from Fraud; 1876, Contracts vitiated by Fraud, &c., may be avoided either by exception or actions.

*55] *Code of Practice, Louisiana, sections treating of Petition and Citation, Art. 170 to 207; of Conservatory Acts, 208, 209; of Sequestration, 269 to 283; of Injunction, 296 to 309; of Appearance and Answer, 316 to 329; of Exceptions, 330 to 346; of Interrogatories, 347 to 356; of Incidental Demands, 362 to 364; of Intervention, 389 to 394; of Parties to Suits, 101; of Amendments, 419 to 440; of Trial which is regularly on hearing before the court and only allowed by jury *sub modo*, 476 to 492 and 493 *et seq.*

1st. The subject-matter of this suit was one of exclusive equity jurisdiction. Surgett had an equitable title to the land in controversy, his opponents had a colorable legal title and possession. In no state, (except Pennsylvania,) where law and equity jurisdictions are distinct, could he stand for one moment in a court of law. His equitable title could be asserted only in a court of equity against the legal title of his adversaries.

2d. The forms of proceeding were more nearly allied to proceedings in chancery than to proceedings at common law. They commence by petition, in which the ground of complaint and relief sought are set forth. The defendant is ruled to answer. The answer admits, denies, or avoids the facts in the petition, or sets forth new matter upon which the defendant may recover if sustained. Interrogatories are filed. The case is heard by the court on the facts and the law, and ends by a decree. See Justice McLean's opinion in *Parsons* v. *Bedford*, 8 Pet., 450.

Now it is not incumbent on us, who appeal from these proceedings, to show that they are perfectly regular chancery proceedings in all their parts. On the contrary, we contend that they are not so, and that, on the principles adopted by this court in *Livingston* v. *Story*, 9 Pet., 632, the decree should be reversed. All that it is incumbent on us to show is, that, whatever these proceedings may be denominated in the Louisiana state practice, and however generally they may be used, they partake sufficiently of the character of chancery proceedings to render an appeal rather than a writ of error proper, the subject-matter being one of equity jurisdiction.

2. *As to the merits.*

On the 21st of November, 1829, Francis Surgett purchased lots 28 to 35 inclusive, in township 5, range 9 east, in the

Ouachita district, Louisiana; said lots fronting on the Mississippi River.

On the 15th of June, 1832, Congress passed an act (4 Stat. at L., 534,) giving to the proprietors of any tracts "bordering on any river, creek, bayou, or water-course" in the territory, *the right of preference in the purchase of [*56 any vacant tract of land adjacent to and back of his own tract, not exceeding forty arpens, French measure, nor in quantity of land that contained in his own tract: "Provided, that the right of preëmption granted by this section shall not extend so far in depth as to include lands fit for cultivation, bordering on another river, creek, bayou, or water-course." The act required that, to entitle a person to its benefits, he should, within three years from the passage thereof, make application to the register and receiver, and make payment for the land. It also required, that when any public offering of the township for sale should be made under proclamation of the President, the preëmptioner should, at least three weeks prior thereto, give notice of his claim.

On the 24th of February, 1835 (4 Stat. at L., 753), Congress passed an act, extending the time given by the act just cited to the 15th of June, 1836.

Before the expiration of the last mentioned act, to wit, on the 20th of May, 1836, Mr. Surgett made application to enter the lands now in controversy, lying immediately back of his river lots, at the same time making tender of payment therefor; which application and tender were refused, on the ground that the land sought to be entered bordered on a bayou, and was fit for cultivation, was consequently subject to private entry, and had actually been entered by others. By reference to the receiver's receipts, it will be seen that a portion of this land had been entered on the 14th of July, 1834, by Edward Sparrow and Edward Whittlesey, jointly, and the remainder by Edward Whittlesey on the 17th of March, 1836. It also appears from the petition, that P. M. Lapice, one of the appellees, had purchased the interest of Sparrow in the land.

From this state of facts the question arises, whether the lands so entered by Sparrow and Whittlesey were subject to private entry, by reason of their being fit for cultivation and bordering on a "bayou," or whether, on the contrary, Mr. Surgett had not a full right of preëmption to these lands, and his application ought not to have been received.

For the appellant it will be maintained, that the decree below was erroneous, for the following reasons:—

1. Because the evidence contained in the record does not show that the land in controversy bordered on any "river,

creek, bayou, or water-course," within the meaning of the act of Congress, dated 15th June, 1832.

It is especially to be remarked, that most of the witnesses who describe this "bayou" as of any considerable length, depth, or width, speak of it from a single visit in the spring *57] of the year *1828, during a freshet, and give both its width and depth as measured from the embankments that enclose it.

It is variously described as from 1 to 2½ miles long, 30 to 80 feet wide, and from 7 to 17 feet deep from the embankments. There is not a particle of evidence that it is navigable, or a perennial stream. On the contrary, the evidence shows that for the greater part of the year it is dry; that it is at no time a running stream, except from overflows of the Mississippi, or heavy rains.

This was not a "bayou" within the meaning of the law. In the Roman civil law, it is laid down, that, to constitute a river or running stream, as contradistinguished from torrents and temporary water-courses, the flow of water must be perpetual; though, if a stream which usually runs throughout the year should happen to be dried up during summer, it would not cease to be perennial, any more than a stream which usually flows only during winter would be perennial because of an extraordinary flow during summer. (Dig., lib. 43, tit. 12.)

Again, the act of Congress speaks of a tract of land "bordering" on a river, &c. It is contended that a fair construction of this law does not apply it to any small and insignificant stream which may pass through a tract of land, making no difference either in the figure of the tract or the computation of its area; but that "bordering" on a stream has reference to a stream which makes one of the "confines," outer edges, or exterior limits, of the tract. A "tract of land," as that expression is used in acts of Congress in relation to public lands, means some legal subdivision, bounded by lines run in the mode prescribed for public surveys. So the word "lands," as used in this act of 1832, must mean some legal subdivisions known to the law. If, then, a stream of water should run through such "tract of land" or "lands" without constituting a "border" or limit to the same, it would not be within the act in question. The law of Congress obviously had reference to such bodies of water as controlled the shape of the tract.

Again, the history of this anomalous mode of surveying authorized by the act of 15th June, 1832, its object, and the geographical peculiarities of the state of Louisiana, all show

that the purpose of the act was to deal with something of more importance than mere swamps or drains.

*2 Whit's Recop., 228, 235, 240, 276, 277, state papers, Public Lands, vol. 8, p. 557. Id. 2, paragraph 2, col. paper 880, memorial of Louisiana. [*58

2. If there were proof in the record derived from the examination of witnesses, it would not be admissible for the purpose of showing that Surgett had not the right to take these tracts as back preëmptions, in view of the fact that the Surveyor-General (to whose discretion it was committed) had laid them out in square sections, had not noted on the official plat the existence of any such body of water as is within the meaning of the law, as he was required to do if any such existed, but had merely indicated by a line the existence of some nameless and insignificent swamp or slough. Act March 3d, 1811, § 2, (2 Stat. at L., 662).

3. Supposing the swamp or slough described in the evidence, and delineated on the plat, to be a "bayou" within the meaning of the act of Congress, still the decree of the Circuit Court was wrong, because some of the tracts in controversy (lots No. 1 and 2 of sec. 61) did not border on this "bayou," taking them even to be entire tracts as they were surveyed and patented. (See plat A.)

But we are not bound to treat them as entire tracts, as they have been surveyed and patented, because the law of the 15th June, 1832, (4 Stat. at L., 534,) itself makes provision for a re-survey of the back lands, in order to enable the front proprietors to avail themselves of the privilege of preëmption. Now if these back lands were re-surveyed, and the front lots extended back in the manner exhibited in plat B, not one of them (except lot 28) could be said to include lands bordering on this "bayou," or through which this bayou runs, unless the bare touching at a single point would exclude the land back of lot 29. As to all the rest, they would be entirely clear of this "bayou."

4. The title which the appellees set up is not good, inasmuch as the original patents to Whittlesey and Sparrow do not cover the land in controversy, there being no such sections, under the laws of the United States, as sections numbered 58, 59, 60, and 61.

The first law, and that which laid the foundation of the land system, was the ordinance of 20th May, 1785. 1 Birchard's Compilation, Land Laws, Opinions, &c., p. 11.

This ordinance pointed out the mode in which the townships should be surveyed, each six miles square; that the plats should be marked by subdivisions of one mile square

containing 640 acres, the lines thereof to be parallel to the external lines of the township, and numbered from 1 to 36, beginning each succeeding range of the lots with the number next to that with which the preceding one concluded; and where a fractional township should be surveyed, the lots protracted thereon should bear the same numbers as if the township had been entire.

*59] *The 2d section of the act of 18th May, 1796, (1 Stat. at L., 467, 468,) prescribes the precise manner in which the sections in townships shall be numbered, beginning with the number one in the northeast section, and proceeding east and west, alternately, through the townships, with progressive numbers, till the thirty-sixth be completed.

The 10th section of the act of 3d March, 1803, (2 Stat. at L., 233,) made it the duty of the surveyor, appointed to survey the lands south of Tennessee, to cause the same to be surveyed, as far as was practicable, into townships, and subdivided in the manner authorized and directed in relation to lands lying northwest of the River Ohio.

The 7th section of the act of 2d March, 1805, (2 Stat. at L., 329,) extends the powers of the surveyor of lands south of Tennessee over the territory of Orleans, and directs him to survey and divide the lands thereof in the same manner, (as near as the nature of the country will admit,) as the lands northwest of the River Ohio.

Thus far the mode of surveying and numbering was uniform and precisely marked out. The section at the northeast corner of every township was to be numbered one, and all the other sections were to be numbered in regular progression from right to left, and left to right, alternately, to the thirty-sixth, which would always and of necessity be the southeast section of the township.

The 2d section of the act of 3d March, 1811, (2 Stat. at L., 662,) authorized a different mode of surveying those lands which lay on rivers, creeks, &c., but did not authorize any change in the other portions of the townships, and such has been the construction of the land office. See 2 Birchard's Comp., 495; *Brown's Lessee* v. *Clements*, 3 How., 650; *Jourdan et al.* v. *Barrett et al.*, 4 Id., 169.

5. As to the objection made by the judge of the Circuit Court, namely, that the act of 1832 was not applicable to lands which had at that time been already offered for sale, it is submitted,—

1st. That the enacting portion of the law is of the most general and comprehensive character.

2d. That the proviso, requiring a notice of claim to be filed

three weeks before offering of the land at public sale, was not intended as an exclusion of lands which had been already offered from the operation of the law, but simply as a facility for ascertaining before any public sale what lands were claimed as back preëmptions, and what were not, so that it could be known beforehand what lands were legally subject to sale and *what were not. This reason not applying to [*60 lands already offered at the date of the act, the proviso requiring three weeks notice did not apply to them. All the preëmption laws contain a similar proviso. Such was the construction of the land office. 2 Birchard's Comp., 573.

The enacting clause applied to all public unappropriated land. The proviso in question was applicable only to such lands as had not been offered.

If this be so, then Mr. Surgett had a right, under the act of 16th June, 1832, at any time prior to the 16th of June, 1835, to file his application to enter the land in controversy.

This right having been extended to the 16th of June, 1836, by the act of 24th of February, 1835 (4 Stat. at L., 753), Mr. Surgett, having made his application on the 20th of May, 1836, was consequently within the time prescribed by law, and his application ought to have been admitted.

Points on the part of the appellees.

1. That this cause involves legal rights, for which a plain and adequate remedy is provided by the ordinary process of the common law.

2. That the character of this action, which is essentially an action at law, is not, and could not be, changed by the laws of Louisiana into a proceeding in equity, in the United States Circuit Court in Louisiana, or in this court.

3. That this cause was tried in the Circuit Court as a court of law, and not according to the forms of a court of equity.

4. And as a consequence of the above propositions, the appellees will contend, that, this being a cause at common law, should have been brought up to this court by writ of error, and not by appeal, and that this appeal should be dismissed.

5. At the trial below, and after it had commenced, the appellant applied for a continuance of the cause, which was refused by the court. To this refusal the appellant excepted. The appellees will contend that the court decided correctly in refusing the continuance, and that such a refusal is not a ground for an exception or appeal.

6. The appellees will contend that the diagram marked B, offered in evidence by the appellant, and mentioned in the second bill of exceptions, was rightly rejected by the court.

7. That there is no error in the opinion of the court in the third bill of exceptions.

8. That the only questions open on this appeal are those raised by the bills of exception.

*61] 9. That the appellant, not having shown that he had any *title to the sections 28, 29, 30, 31, 32, and 33, at the time (to wit, the 26th of May, 1836) when he claimed to purchase the property in dispute from the register of the land office, as back concessions to said sections, and not having shown that he acquired any title to said sections until the 15th of June, 1837, his application was rightly rejected by the register of the land office.

10. That the application of the appellant to purchase the back concessions, being indefinite, and not showing the extent of the land which he claimed to purchase, was not such as is required by law, and was rightly rejected by the register.

11. That the right to purchase back concessions is confined to owners of front tracts which do not exceed forty arpens, French measure, in depth, and the appellant not having shown what is the depth of his front tract, has not established his right to any back concessions.

12. That the register of the land office, having decided against the claim of the appellant, his decision is conclusive, so far, at least, as this case is concerned, or, if not conclusive, is correct.

13. That the appellant did not, at the time of his application, make payment or a legal tender for the back concessions claimed by him.

14. That the land in controversy is fit for cultivation, and borders on the Mill Bayou, which is sufficiently large and deep to drain the adjoining country, and render it fit for cultivation, and that said land therefore cannot be claimed as a back concession.

15. That the land in controversy was offered at public sale, in pursuance of a proclamation of the President, on the third Monday of November, 1829, and was therefore not liable to be claimed as a back concession.

Additional point of the appellees:—

16. A part of the land in question, was purchased by the appellees, or those under whom they claim, on the 14th of July, 1834. They will therefore contend, that they had obtained a vested title thereto at the time of the passage of the act of 24th February, 1835, ch. 24 (4 Stat. at L., 758), which could not be divested by the application of the appellant made on the 20th of May, 1836.

See *Thompson* v. *Schlatter*, 13 La., 119, and Act of 15th

June, 1832, ch. 140 (4 Stat. at L., 534); 2 Birchard's Land Laws, 727.

The appellees will cite the following authorities in support of the first fifteen points made by them.

*On the 1st point. 1 Starkie Sland. (2d Am. ed.), [*62 marginal pages 2 and 191.

On the 2d point. *Livingston* v. *Herman*, 9 Mart. (La.), 713; 2 Cond. R., 40; *Thompson* v. *Schlatter*, 13 La., 119; *McDonogh* v. *Millaudon*, 3 How., 693; *U. S.* v. *King*, 3 Id., 773; Code of Practice of La., p. 8, art. 30, p. 90, art. 374, 10, art. 41 and 43, p. 12, art. 44; *Vidal* v. *Duplantier*, 7 La., p. 45 (8 N. S., 105); *Poultney* v. *Cecil*, 8 La., 422; 7 How., 846; Constitution of U. S., art. 3, § 2, and art. 7 of Amendments; Act of Congress of 24th Sept., 1789, ch. 20, § 16 (1 Stat. at L., 82); Act of 26th May, 1824, ch. 181, § 1 (4 Id., 62); *Parsons* v. *Bedford*, 3 Pet., 433, 446; *Livingston* v. *Story*, 9 Id., 632; *Minor* v. *Tillotson*, 2 How., 392; *Phillips* v. *Preston*, 5 Id., 278, 289.

On the 3d point. Act of 24th Sept., 1789, ch. 20, § 12 (1 Stat. at L., 79); Stat. of 13 Ed. I., ch. 31; 1 Saund. Pl. & Ev., 317 and 318; *Mayhew* v. *Soper*, 10 Gill & J. (Md.), 366; *Phillips* v. *Preston*, 5 How., 278, 289.

On the 4th point. Act of 24th Sept., 1789, ch. 20, § 22 (1 Stat. at L., 84); Act of 3d March, 1803, ch. 93, § 2 (2 Id., 244); San Pedro, 2 Wheat., 132; *Ward* v. *Gregory*, 7 Pet., 633; *Parish* v. *Ellis*, 16 Pet., 451.

On the 5th point. *Sims* v. *Hundley*, 6 How., 1; 2 Chit. Gen. Pr., 572; *Mellish* v. *Richardson*, 9 Bing., 126 (23 E. C. L., 276).

On the 6th point. Act of 18th May, 1796, ch. 29, § 2 (1 Stat. at L., 464); Act of 3d March, 1803, ch. 40, § 10 (2 Id., 244); Act of 3d March, 1831, ch. 116, § 5 (4 Id., 493); 1 Greenl. Ev., 2d ed., §§ 501, 502.

On the 7th point. The acts cited under the 6th point, and 1 Greenl. Ev., §§ 440, 441.

On the 8th point. 38th Rule of Court; *Armstrong* v. *Toler*, 11 Wheat., 277; *Pennock* v. *Dialogue*, 2 Pet., 15; *Carver* v. *Astor*, 4 Id., 1; *ex parte Martha Bradstreet*, 4 Id., 102; *Magniac* v. *Thompson*, 7 Id., 348; *Gregg* v. *Lessee of Sayre and Wife*, 8 Id., 244; Act of 24th April, 1820, § 2; Act of 10th May, 1800, § 7.

On the 9th, 10th, and 11th points. Act of 15th June, 1832, ch. 140 (4 Stat. at L., 534).

On the 10th point, also, 9 La., 57.

On the 12th point. Act of 15th June, 1832, ch. 140 (4 Stat. at L., 534), and act of 24th Feb., 1835, ch. 24 (4 Id.,

753). The appellants will also rely on the decision of the Secretary of the Treasury affirming the decision of the register of the land office in this case, and will cite the
*63] *decision of the Secretary of the Treasury on the 18th of March, 1839, in the case of Robert Ford and others. *Bagnell* v. *Broderick*, 13 Pet., 450.

On the 13th point. Act of 15th June, 1832, ch. 140 (4 Stat. at L., 534).

On the 14th point. Act of 3d March, 1811, ch. 46, §§ 5 and 10 (2 Stat. at L., 668, 665); Act of 15th June, 1832, ch. 140 (4 Id., 534); Act of 24th April, 1820, ch. 51, § 3 (3 Id., 566).

On the 15th point. The same acts referred to in the preceding point, and *Thompson* v. *Schlatter*, 13 La., 119.

17th. The appellees will also contend that the petitory action instituted by the appellant in this case cannot be maintained on the equitable title set up by him. *United States* v. *King*, 7 How., 846; S. C., 3 Id., 773.

Authorities cited by the counsel for the appellants, in reply.

The following acts of Congress were cited in reply to the twelfth point in the brief of the appellees, to show that, in those preëmption laws where the decision of the register and receiver has been treated as conclusive, the power of decision has been *expressly given* to the registers and receivers to determine the fact of occupancy and cultivation, without any appeal from their decision.

Act of 31st March, 1808, § 2 (2 Stat. at L., 480). Act of 29th May, 1830 (4 Id., 420), upon which the language of the court in *Wilcox* v. *Jackson*, 13 Pet., 498, was founded. Act of 22d June, 1838 (5 Id., 251), which was a continuation of the last-cited act. Act of 19th June, 1834 (4 Id., 678); also a continuation of the act of 1830. Act of 4th Sept., 1841, § 11 (5 Id., 456).

In the laws granting back preëmptions in Louisiana, there is *no power of determination* given to the register and receiver.

The Circular issued from the treasury department, June 19th, 1801 (2 Birchard's Comp., 226), will be cited to show that the abstract on page 53 and the extract from the Sales book, page 54, of the record, were required by the instructions from the general land office, and properly offered in evidence.

Also, Commissioner's Instructions to Register, New Orleans, &c., 2 Birchard's Comp., 374. Mr. Haywood to Registers and Receivers, 2 Id., 465. Circular to Registers and Receivers, June 15, 1821 (2 Id., 314). And especially the circular

of 7th June, 1820, under the cash system. (Certified copy from general land office.)

*The letter of Land Commissioner to Registers and Receivers in Louisiana, in relation to the Act of 15th June, 1832, will be referred to. 2 Birchard's Comp., 578. [*64

Reference is also made to the last paragraph of the Circular of 5th September, 1821, (2 Birchard's Comp., 356, to show that the certificates of the register and the receiver's receipts were to bear the same numbers, and were to be issued in all instances in regular numerical order.

Mr. Justice CATRON delivered the opinion of the court.

1. On the facts appearing in the record, a motion was made to dismiss the suit for want of jurisdiction, because it was brought here by appeal, which brings before the revising court all the evidence; whereas, had a writ of error been brought, such parts of the evidence only could have been considered as were presented by bills of exception. This motion has been held up for a length of time, and is now considered with the merits, and the inquiry standing in advance of the merits is, whether the appeal shall be dismissed. The suit was commenced in a state District Court according to a prescribed form of practice in Louisiana, and removed by the defendant from the state court to the Circuit Court of the United States, where the same mode of pleading and practice was necessarily pursued that would have been, had the cause continued in the state court, and been there adjudged; it therefore comes here as an anomalous case.

The proceeding was commenced by Lapice and Whittlesey; they asked to have a cloud removed from their title, which they alleged was embarrassed by a pretended and illegal claim of Surgett to a back concession, of anterior date to their title, and for the same land. Surgett came in, and set forth his claim; it was purely equitable in its character, in the sense of the term "equity," as denominated in the Constitution and acts of Congress; this claim Surgett, (by a petition in his answer,) by way of reconvention, asked to have enforced against Lapice and Whittlesey. He thereby became complainant. The character of Lapice and Whittlesey's title is not in controversy; both sides admit that it is a legal and valid title on its face, and as against the United States indisputable; but Surgett sets up a right of preference to entry of the same land at the time when the entries were made under which Lapice and Whittlesey claim, and the question is, how was the Circuit Court to deal with the matter when an appeal or writ of error was demanded, as the one or the other the

judge was compelled to allow; he was called on for a decree
*65] by *each party, as on bill and cross-bill in an ordinary chancery proceeding, and did decree that Lapice and Whittlesey should be quieted in their title to, and possession of, the land in controversy, and that Surgett should be for ever enjoined from setting up any claim or pretension to the same; and so he might have decreed the other way; and although, by the laws of Louisiana, a jury might have been called in a state court to aid in ascertaining the facts, yet as none was required by the parties in the Circuit Court, and the cause was heard by the court alone, and a decree rendered, we think the mere fact that a state court might employ a jury does not affect the character of the proceedings actually had in the Circuit Court. In other states, juries are frequently employed by the chancellors when hearing causes, as in Kentucky, where it is required by a statute; yet if an ordinary suit in equity was removed from a state court to the Circuit Court (United States), in a district where, by the state statutes, a jury was required to find contested facts; still the Circuit Court would not be required to resort to a jury, nor could it do so. And we take occasion here to say, that, had the Circuit Court submitted the cause to a jury in this instance, we should have deemed it improper, although demanded by either side. Our opinion, therefore, is, that there was litigated in the Circuit Court a mere equitable title, in a form impressed on the proceeding in a state court, and a decree pronounced as a court of equity would have done in a regular course of proceeding in chancery; and that the merits of the cause could only be reviewed on appeal.

But as several cases have been dismissed from this court because they were brought here by appeal instead of a writ of error, it is insisted that this rests on the same grounds of those that have been dismissed, and the case of the *United States* v. *King*, (3 and 7 How., 773 and 844) has been much relied on to show that this cause cannot be brought here by appeal. But that was not an action of title to quiet the plaintiff in possession of his land, but was a petitory action brought by the United States to recover land which was in the possession of the defendant, and to which the United States claimed a legal title. The suit was in the nature of an ejectment in a court of common law, and was therefore strictly an action at law, and in no respect analogous to a proceeding in equity to remove a cloud from the title of a party who not only holds the legal title, but is also actually in possession of the land in dispute; and as the United States cannot be sued in reconvention, if the defendant had claimed an

equitable title in that case, it would have been no defence, because he could not make the United States a defendant, and himself a plaintiff, by a suit in reconvention. [*66 The whole proceedings were necessarily proceedings at law, and could therefore be removed by writ of error only, and not by appeal. And substantially of the same character were all the cases relied on by counsel to dismiss this appeal; none of them resembled the case before us in any material degree, —certainly not enough to govern it,—and the jurisdiction is consequently sustained.

2. We come in the next place to discuss the merits; and here some general considerations present themselves. On the first settlement of Lower Louisiana, the nature of the country imposed on the governments who successively held it a peculiar policy in granting land to individual proprietors; the Mississippi River overflowed its banks annually, and to overcome this impediment to cultivation, and to reclaim the back lands, heavy embankments had to be thrown up on the sides of the river, so as to keep the water at flood-tide within the channel; and these embankments had to be connected and continuous for a great distance, otherwise the whole country would be submerged; and the king's domain was resorted to as a means of securing the country from overflow, and of reclaiming it to a great extent; and individual proprietors were relied on to do that which, in other countries at all similarly situated, was a great national work; and it is matter of surprise how much the policy accomplished with such feeble and questionable means. The grants were not large, and fronted on the river only to the extent of from two to eight arpens as a general rule, and almost uniformly extended forty arpens back; to these front grants the Spanish government reserved the back lands, to another depth of forty arpens; and although few if any grants were made of back lands in favor of front proprietors, still they were never granted by the Spanish government to any other proprietor, but used for the purpose of obtaining fuel and for pasturage by the front owners, so that, for all practical purposes, they were the beneficial proprietors;—subject to the policy of levees, and of guarded protection to front owners. We took possession of Lower Louisiana in 1804. In 1805, commissioners were appointed, according to an act of Congress, to report on the French and Spanish claims in that section of country, and by the act of April 21st, 1806, it was made a part of their duty "to inquire into the nature and extent of the claims which may arise from a right, or supposed right, to a double or additional concession on the back of grants or concessions heretofore made," previous to

the transfer of *government, "and to make a special report thereon to the Secretary of the Treasury, which report shall be by him laid before Congress, at their next ensuing session. And the lands which may be embraced by such report shall not be otherwise disposed of, until a decision of Congress shall have been had thereon."

The commissioners were engaged nearly six years in the various and complicated duties imposed on them, and then reported, that, by the laws and usages of the Spanish government, no front proprietor by his own act could acquire a right to land farther back than the ordinary depth of forty arpens, and although that government invariably refused to grant the second depth to any other than the front proprietor, yet nothing short of a grant or warrant of survey from the governor could confer a title or right to the land; wherefore they rejected claims for the second depth, as not having passed as private property to the front proprietor under the stipulations of the treaty by which Louisiana was acquired. As by the Spanish policy and usages the front owner had reserved to him a preference to become the purchaser of the second depth, Congress by the fifth section of the act of March 3, 1811, provided that every person who "owns a tract of land bordering on any river, creek, bayou, or water-course," in the territory of Orleans, "and not exceeding in depth forty arpens, French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of, his own tract, not exceeding forty arpens, French measure, in depth, nor in quantity of land that which is contained in his own tract, at the same price, and on the same terms and conditions, as are, or may be, provided by law for the other public lands in the said territory." And inasmuch as the country had not to any material extent been prepared for sale in the ordinary mode by public surveys, it was made the duty of the principal deputy surveyor of each of the two districts in the Orleans territory, to cause to be surveyed the preference rights claimed under the act; and where, by reason of bends in the river, bayou, creek, or water-course on which a front tract bordered, and where there were similarly situated tracts, so that each claimant could not obtain a quantity equal to his front grant, it was made the duty of the surveyor to divide the vacant land between the several claimants in such manner as to him might appear most equitable. To gratify preëmptions claims secured by the act, no township surveys in advance of an entry were contemplated, as they could not be regarded did
*68] they exist; and as the act was limited to three years' duration, *little of the country was likely to be sur

veyed before the time for making entries expired. By the seventh section of the act of May 11, 1820, the fifth section of the act of March 3, 1811, was renewed, and continued in force until May 11, 1822; and by the act of June 15, 1832, the act of 1811 was again renewed for three years, with some slight amendments; and by the act of February 24, 1835, the time was further extended to June 15, 1836.

The township where the land in dispute is situated was offered for sale, according to the President's proclamation, in November, 1829; and as Surgett first offered to make his entry in 1836, it is insisted that, after the lands in the township were offered at public sale, no entry founded on a preference right was allowable at the land office; and such was the opinion of the court below, and is one of the reasons assigned for rejecting Surgett's claim. The act of 1832 provides, that the claimant shall deliver his notice of claim to the register of the proper land office, stating the extent and situation of the tract he wishes to purchase, and shall make payment; but it has this proviso,—that all notices of claim shall be entered, and the money be paid thereon, at least three weeks before such period as may be designated by the proclamation of the President for the sale of the public lands in the township where such claim may be situated; and all claims not so entered shall be liable to be sold as other public lands. The proviso was an exception to a general law giving a right of entry; it was prospective, having reference to future public sales, and not to lands that had been previously offered, and remained unsold; Surgett could not comply with the condition, nor had it any application to such a case as his claim presents.

The manifest object of Congress was to disembarrass public sales by barring preference rights that would be a cloud on the title of lands thus offered.

The foregoing construction being the one adopted by the departments of public lands soon after the act of 1832 went into operation, we should feel ourselves restrained, unless the error of construction was plainly manifest, from disturbing the practice prescribed by the Commissioner of the General Land Office, acting in accordance with the opinion of the Attorney-General, and which had the sanction of the Secretary of the Treasury and of the President of the United States.

The court below rejected Surgett's claim to enter the back land on another ground. The acts of Congress securing the preference contain an exception,—"that the right of pre-emption shall not extend so far in depth as to include lands fit for *cultivation bordering on another river, creek, [*69

bayou, or water-course." And the question is, To what description of water-course did the legislature refer? The enacting clause provides that every person who owns a tract of land "bordering" on any river, creek, bayou, or water-course, shall have the right of pre-emption to the back land. The act of 1811 has been construed, in the department of public lands, for nearly forty years, to mean that those owners whose lands fronted on a navigable stream were only provided for; and that the word "border," both in the enacting clause and in the exception, meant to front on a navigable water-course; that is to say, such waters as are described in the third section of the act of February 20th, 1811, by which Louisiana was authorized to form a state constitution and government, by which act the River Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, were declared to be common highways, and for ever free, as well to the inhabitants of the said state, as to other citizens of the United States.

Similar provisions as respects navigable waters are common to other states where there are public lands, and the practice has been uniform to survey and sell the lands "bordering" on navigable streams as fractional sections; nor is the channel ever sold to a private owner. Of necessity, it had to be left almost exclusively to the department of lands executing the public surveys to ascertain what stream was navigable, and should be bordered by fractions and reserved from sale; and, on the other hand, what waters were not navigable, and should be included in square sections, and the channel sold. The registers and receivers were bound by recorded returns of the surveyors, (as a concluded fact,) to sell according to the surveys, nor could the register and receiver be allowed to hear evidence contradicting the surveys, as to whether the waters included by them were or were not navigable. Subject to this state of the law, Surgett offered (20th May, 1836) to enter the back land to front numbers 28, 29, 30, 31, 32, and 33; making $989\frac{8}{100}$ acres, which lots adjoin, and were included in one patent, together with two other lots, Nos. 34 and 35, also adjoining on the south, to which he did not claim any back land; that is to say, he claimed $989\frac{8}{100}$ acres as a back concession to a patent of $1{,}308\frac{1}{100}$ acres, so as to extend the six lots first named; and if neither the bayou, nor the existence of previous entries, stood in the way, he had a clear right to enter. Sparrow and Whittlesey's entries were in part fractions, not, however, produced by having bordered on a stream, but because they adjoined front lots on the Mississippi

River not surveyed *in squares, but according to the second section of the act of March 3, 1811.

In surveying township number five, the Mill Bayou was entirely disregarded, and the surveys of sections and quarter-sections were made in rectangular figures, and laid down and sold across that water, the channel of which was granted in part to Sparrow and Whittlesey, and in part to others. According to the rules, therefore, by which the register and receiver were governed, they had no right to refuse Surgett's entry for the reason that the land bordered on another navigable stream.

How far the powers of the court below extended to contradict the public surveys and records of the land office, we refrain from discussing in this case, as the parties on the one side and on the other affirmatively appealed to a court of justice to decide the fact, whether the bayou was of the description contemplated by the acts of Congress, and a water-course on which lands could front. It is between two and three miles long, and drains swamps, and a shallow pond, or rather lagoon; its greatest width is from seventy to eighty feet from bank to bank, and the channel in part is some fifteen feet deep from the top of its banks; but at no time of the year has it any claims to be a navigable stream, being nearly dry for a greater portion of the year, having no running water, or any water in it, except stagnant pools; it is an ordinary drain of the Mississippi swamp, and of shallow ponds. Near its mouth, at the Mississippi River, there is a levee,—and so there is one near to the pond, at its farther end from the river; both levees being on lands granted to Surgett. Before the lower levee was constructed, there had been a mill for grinding erected on the bayou, which gave it the name it bears; the flow of water was then from the Mississippi River through this outlet to the swamp, in times when the river was high. But it was never fit for any purpose, as a channel through which commerce could be carried on by water. The ground of defence must therefore fail, that the lands entered by Sparrow and Whittlesey bordered on a bayou, and were within the exception of the act of 1832.

The Circuit Court also held that the back land was proved to be fit for cultivation, and being so, was excepted from the enacting clause giving a preference of entry. The exception is, "that the right of pre-emption shall not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water-course." There is no break in the sentence, and we hold that Congress clearly intended to make a single exception, whereas the court below

divided the *clause cited into two exceptions; excluding a preference right, first, if a bayou, &c., intervened; and, secondly, if the land was fit for cultivation, whether there was a navigable water in its rear, or not.

We only deem it necessary on this head to say, that, from 1811 to this time, the general land office has construed the exception as being single, requiring that the back land should border on another navigable stream; and also, that it should be fit for cultivation, before the preference of entry could be denied; and we take occasion here to declare, that, unless this uniform construction for so long a time by the land department was most manifestly wrong, we should not feel ourselves at liberty to disturb it, as, by doing so, titles might be shaken, and confusion produced.

For the reasons stated, it is ordered that the decree of the Circuit Court be reversed, and that the cause be remanded to that court, with directions to enter a decree for the plaintiff in reconvention, Surgett; and that court is directed to cause a survey to be made under its supervision, laying off the back land to lots Nos. 28, 29, 30, 31, 32, and 33, according to the practice in use in like cases in the surveyors' offices in Louisiana. And it is further ordered, that said Surgett may be decreed to be the legal owner of said land, to the extent that the lands of said Peter M. Lapice and the heirs of Edward Whittlesey interfere with a survey legally made of said back lands; and that said Lapice and the representatives of said Whittlesey be decreed to convey to said Francis Surgett such parts of the lands included in the survey as are embraced by any of the entries or patents set forth in the original petition of said Lapice and Whittlesey; and that said Surgett may be quieted in his title and possession of the lands hereby decreed. And it is further ordered, that said Lapice and Whittlesey's representatives recover from said Francis Surgett after the rate of one dollar and twenty-five cents per acre, for all the land that they are deprived of by this decree, with interest on said sum after the rate of five per centum per annum from the 10th day of May, 1836, until paid; and that said amount shall be ordered to be paid forthwith into court, subject to the order of said Lapice and Whittlesey's representatives; nor shall said decree be executed until the money is paid. And it is further ordered, that said Lapice and Whittlesey's representatives shall pay the costs of the appeal to this court; but that the costs of the Circuit Court, which have already accrued, and such as may hereafter accrue, shall be adjudged by the court

*72] below, on a future hearing, as law and justice may require. And it is further ordered, that in *all mat

ters that may arise in said cause, and in respect to which no special directions are given by this decree, the Circuit Court shall proceed according to the law and equity of the various matters presented, without being restrained by this decree.

Order.

This cause came on to be heard on the transcript of the record of the Circuit Court of the United States, for the District of Louisiana, and was argued by counsel. On consideration whereof, it is ordered, that the decree of the Circuit Court be reversed, and that this cause be remanded to that court, with directions to enter a decree for the plaintiff in reconvention, Surgett; and that court shall cause a survey to be made under its direction, laying off the back land to lots Nos. 28, 29, 30, 31, 32, and 33, according to the practice in use in like cases in the surveyors' offices in Louisiana. And it is further ordered, that said Surgett may be decreed to be the legal owner of said land, to the extent that the lands of said Peter M. Lapice and the heirs of Edward Whittlesey interfere with a survey legally made of said back lands, and that said Lapice and the representatives of said Whittlesey be decreed to convey to said Francis Surgett such parts of the lands included in the survey as are embraced by any of the entries or patents set forth in the original petition of said Lapice and Whittlesey; and that said Surgett may be quieted in his title and possession of the lands hereby decreed. And it is further ordered, that said Lapice and Whittlesey's representatives recover from said Francis Surgett after the rate of one dollar and twenty-five cents per acre for all the land that they are deprived of by this decree, with interest on said sum after the rate of five per centum per annum, from the 10th day of May, 1836, until paid; and that said amount shall be ordered to be paid forthwith into court, subject to the order of said Lapice and Whittlesey's representatives; nor shall said decree be executed until the money is paid. And it is further ordered, that said Lapice and Whittlesey's representatives shall pay the costs of the appeal to this court; but that the costs of the Circuit Court which have already accrued, and such as may hereafter accrue, shall be adjudged by the court below, on a future hearing, as law and justice may require. And it is further ordered, that in all matters that may arise in said cause, and in respect to which no special directions are given by this decree, the Circuit Court shall proceed according to the law and equity of the various matters presented, without being restrained by this decree.

*ASHER M. NATHAN, PLAINTIFF IN ERROR, v. THE STATE OF LOUISIANA.

A tax imposed by a state upon all money or exchange brokers is not void for repugnance to the constitutional power of Congress to regulate commerce.

Foreign bills of exchange are instruments of commerce, it is true; but so also are the products of agriculture or manufactures, over which the taxing power of a state extends until they are separated from the general mass of property by becoming exports.[1]

A state has a right to tax its own citizens for the prosecution of any particular business or profession within the state.[2]

Banks deal in bills of exchange, and this court has recognized the power of a state to tax banks, where there is no clause of exception in their charters.

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[1] CITED. *State Tonnage Tax Cases*, 12 Wall., 213; *Transportation Co.* v. *Wheeling*, 9 Otto, 279; *Trademark Cases*, 10 Id., 95.

"The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter * * * and the states may legislate, in the absence of congressional regulations. * * * Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress;" but where the subject is local, and not national, and "is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities" of the several states, the doctrine of the exclusive power of Congress cannot be maintained, and all such matters may be constitutionally regulated by state laws. *Cooley* v. *Board of Wardens of Philadelphia*, 12 How., 299. Compare *Gibbons* v. *Ogden*, 9 Wheat., 1; *Mobile County* v. *Kimball*, 12 Otto, 691.

Until some action is taken by Congress, the legislation of a state, not directed against commerce in any of its regulations, but relating, generally, to the rights, duties, and liabilities of citizens, is of obligatory force within its territorial jurisdiction, although it may indirectly and remotely affect the operations of foreign or inter-state commerce, or persons engaged therein. *Sherlock et al.* v. *Alling, admr.*, 3 Otto, 99; S. P. *Munn* v. *Illinois*, 4 Id., 113; *Peik* v. *Chicago &c. R. R. Co.*, Id., 164; *Harrigan* v. *Connecticut River Lumber Co.*, 129 Mass. 580; s. c. 37 Am. Rep., 387; *Boardman* v. *Lake Shore &c. R. R. Co.*, 84 N. Y., 157.

It is well settled that the power to regulate commerce, existing in Congress, does not include the means by which commerce is carried on within a state. *The Passaic Bridges*, 3 Wall., 782 (App.); *Halderman* v. *Beckwith*, 4 McLean, 286; *United States* v. *The Bright Star*, 8 Int. Rev. Rec., 130.

But the state law must not attempt to tax the importing into the state from a foreign country, *Cook* v. *Pennsylvania*, 7 Otto, 566, (where a tax on auction sales of imported goods was imposed). S. P. *Turner* v. *State*, 55 Md., 240; or the exporting from the state to a foreign country, or the statute will be void. *Almy* v. *State of California*, 24 How., 169.

[2] APPLIED. *Paul* v. *Virginia*, 8 Wall., 184. CITED. *Ward* v. *Maryland*, 12 Wall., 428; *Kirtland* v. *Hotchkiss*, 10 Otto, 499; *Wiggins Ferry Co.* v. *East St. Louis*, 102 Ill., 574; *Corson* v. *State*, 57 Md., 266. "No state can, consistently with the Federal Constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own country." [Reviewing many authorities.] *Guy* v. *Baltimore*, 10 Otto, 434, 439. S. P. *Higgins* v. *Casks of Lime*, 130 Mass., 1.

State laws taxing, (by means of a

THIS case was brought up from the Supreme Court of the state of Louisiana, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

On the 26th of March, 1842, the state of Louisiana passed an act to increase the revenue of the state, the ninth section of which provided that "each and every money or exchange broker shall hereafter pay an annual tax of $250 to the state, in lieu of the tax heretofore imposed on them."

On the 8d of February, 1845, Isaac T. Preston, the Attorney-General of the state, filed a petition in the District Court of the first judicial district, stating that A. M. Nathan was justly indebted to the petitioner in the sum of $250, for pursuing or having lately pursued, within the year 1843, the business of a money and exchange broker. The petition then prayed that he might be cited to appear and answer, and be condemned to pay; also that he might answer the following interrogatories under oath, viz.:—

"Were you a broker, as above stated, in 1843?

"Did you or not receive brokerage or commissions?

"State clearly the nature of the same; whether received in money transactions."

The same process was pursued to collect the tax for 1844.

On the 19th of April, 1845, the two suits were consolidated and the defendant answered as follows:—

"The defendant for answer denies generally all the allega-

license fee) the sale within their limits, of ardent spirits, imported or domestic, in less than specified quantities, are constitutional. *The License Cases*, 5 How., 504. The fact that Congress has imposed a license tax makes no difference. *Pervear* v. *Commonwealth*, 5 Wall., 475. But a state law which taxes, exclusively, sales of goods of foreign origin, thereby discriminating in favor of home productions, is unconstitutional and void. *Welton* v. *State of Missouri*, 1 Otto, 275. See also *Cook* v. *Pennsylvania*, 7 Id., 566.

Foreign insurance companies may be constitutionally compelled to pay license fees for the privilege of transacting business within a particular state. *Paul* v. *Virginia*, 8 Wall., 168; *Ducat* v. *Chicago*, 10 Id., 410; *Liverpool Ins. Co.* v. *Massachusetts*, Id., 566. And see *People* v. *Nat. Fire Ins. Co.*, 27 Hun (N. Y.), 188. So may an express company which carries or forwards goods beyond the limits of the state. *Osborne* v. *Mobile*, 16 Wall., 479. But compare *State* v. *American Express Co.*, 7 Biss., 227. And telegraph companies doing business in part in, and in part without the state. *West. Union Tel. Co.* v. *State*, 55 Tex., 314. And drummers, and merchants who travel soliciting orders. *Ex parte Robinson*, 12 Nev., 263. But see to the contrary, if a discrimination is made between agents to sell goods which are the products of the state, and salesmen of goods brought from other states. *Webber* v. *Virginia*, 13 Otto, 344. Compare *Corson* v. *State*, 57 Md., 251; *Howe Machine Co.* v. *Cage*, 9 Baxt. (Tenn.), 518.

In *Mager* v. *Grima*, *post* *490, a succession tax imposed by the state of Louisiana, upon persons not citizens of the United States, and not domiciled in the state, was held constitutional.

tions in the plaintiff's petition contained. And further answering, he says, that so much of such parts of 'An act to increase the revenue of the state,' under and by virtue of which this suit is brought to recover of this defendant the tax thereby imposed upon the business of a money and exchange broker, and especially the ninth section thereof, particularly referred to in the plaintiff's petition, so far as the said section and act *74] impose a tax on that part of the business of a money and exchange *broker which consists in buying and selling exchange, the same is contrary to and in violation of so much and such parts of the Constitution of the United States as give to Congress the exclusive power to regulate commerce, and prohibit to the states all interference with the power so granted, and forbid them to impose, without consent of Congress, any duty on imposts or exports.

"And so far as the said section and act imposes a tax on that part of the business of a money and exchange broker which consists in buying and selling money or foreign coin, or other currency, the same is contrary to and in violation of so much and such parts of the Constitution of the United States as gives to Congress the exclusive power 'to coin money, regulate the value thereof, and of foreign coin.'

"And so far as said section imposes a tax, not uniform in amount with other state taxes on occupations, respondent avers, that the same is contrary to so much of the treaties, laws, and Constitution of the United States as reserve and guarantee to the inhabitants of Louisiana all the rights, advantages, and immunities of citizens of the United States, particularly that of uniform taxation; and to so much of said Constitution as reserves to the people of the several states all powers not delegated to the states respectively, or to the Union.

"Wherefore he prays, that the plaintiff's demand be dismissed, with costs, and for all other and general relief which his case may require.

(Signed,) RICHARD HENRY WILDE,
Defendant's Attorney.
" A. K. JOSEPHS.
" H. H. STRAWBRIDGE."

A. M. Nathan, defendant, for answer to the interrogatories to him propounded in the above entitled suit, says:—

"I was a money and exchange broker in 1843 and 1844; I received a brokerage or commissions on money and bills of exchange sold by my agency.

"I will state clearly the nature of the same. My business, like that of money and exchange brokers in general, consists exclusively in negotiating and effecting for others the purchase and sale of exchange on other states or foreign countries. During the thirty years that I have been a money and exchange broker, I believe,—nay, I am certain,—that I have never, as such, sold a single bill drawn from one point of Louisiana on another.

"I make myself acquainted with the current market value of exchanges. The purchasers and the sellers [*75 both resort to me for information on the state of the market of exchanges, and make me their common agent in the purchase and sale of bills, which are purchased for the purpose of making remittances to foreign parts, and usually so remitted immediately. On and out of the price of each bill, I receive a percentage or commission, varying from one fourth to one eighth of one per cent., which is commonly paid on settlement. It is the same in money transactions.

(Signed,) A. M. NATHAN."

On the 7th of June, 1845, the District Court decreed that the state of Louisiana should recover of the defendant, A. M. Nathan, the sum of five hundred dollars, and costs of suit.

An appeal was had to the Supreme Court of Louisiana, which, on the 15th of December, 1845, affirmed the judgment of the District Court. The defendant sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Wilde* (in a printed argument), for the plaintiff in error, and *Mr. Coxe*, for the defendant.

Mr. Wilde contended, that the law of Louisiana was repugnant to the Constitution of the United States, because it interfered with the exclusive power of Congress to regulate commerce.

Congress has the exclusive power to regulate commerce. The power to regulate implies the power to preserve. An unlimited power to tax is a power to destroy. A state cannot have the power to impair or destroy that which Congress has the power to preserve and regulate: therefore, a state cannot tax the instruments whereby Congress exercises its constitutional powers. 4 Wheat., 428, 432.

Exchange is a necessary instrument of commerce. 4 Wheat., 147; 18 Pet., 531, 548, 563, 606.

The mind cannot conceive the possibility of carrying on

commerce, in the present state of the world, without bills of exchange.

A bill drawn in one state, on the citizen of another, is a foreign bill. *Buckner* v. *Finley*, 2 Pet., 586.

The sole business of plaintiff in error, therefore, is buying and selling foreign exchange. See answer to interrogatories.

There is not a particle of testimony that he deals in domestic exchange, or in money. The court, consequently, in *76] adjudging against him, could only have proceeded, and did, in *fact, proceed, upon the ground that, as a dealer in foreign exchange exclusively, he was subject to the tax; and that the act imposing it was constitutional.

Now, there is no difference between taxing the *article* and taxing the *faculty* to sell it. 4 Wheat., 399; 12 Id., 444.

To tax the trade or faculty of selling bills of exchange, then, is the same thing as to tax the bills themselves.

To tax bills of exchange is to tax a necessary instrument of commerce, and taxing that without which commerce cannot be carried on is imposing a tax on commerce itself. It is no answer to say, that the impost is moderate, though in the present case it is, in fact, excessive, because, if the state can tax at all, it may tax indefinitely, and an indefinite power to tax is a power to destroy. 4 Wheat., 428, 432.

Exchange is as necessary an instrument of commerce as ships or vessels.

Could the state of Louisiana levy a tax, in the shape of a license, to every consignee or ship-broker in the city of New Orleans, prohibiting captains of vessels, and all others, from acting as consignees without such license?

Would it avail the state to say, such an imposition is not a tax on commerce, nor a duty on ships and vessels, but only a license on the faculty of acting as consignee on the trade of ship-broker?

All useful regulation does not consist in restraint or taxation. That which Congress, in the exercise of their constitutional power, think proper to leave *free*, is as much regulated by them, as that which they restrain or tax. 9 Wheat., 18. Were it not so, it would not be an exercise of the power to "lay duties," when certain goods are allowed to be imported duty free. Could a state tax the introduction of such goods?

Where there is a repugnancy between the state power to tax, and the Federal power to preserve, regulate, and leave free, the state power must give way. If the state can tax in such a case, Congress is not supreme. 4 Wheat., 429, 432, 433.

A state can have no concurrent power over that in regard

to which the power of Congress is exclusive. What sort of concurrent powers would those be which cannot exist together? 9 Wheat., 15.

Congress has no power of revoking state laws, as a distinct and substantive power. It legislates over subjects, and over those subjects which are within its constitutional province its legislation is supreme, and overrules all inconsistent or repugnant state legislation. 9 Wheat., 30.

*Its exclusive power to regulate commerce carries [*77
with it the power to regulate exchange as an indispensable instrument of commerce, and the power being exclusive, a concurrent power in the state is a contradiction.

"Commerce in its simplest signification means an exchange of goods: but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation."—Mr. Justice Johnson, in *Gibbons* v. *Ogden*, 9 Wheat., 229, 230.

Thus it has been resolved, that a steamer employed in transporting passengers is as much engaged in commerce, as a sail vessel freighted with merchandise, and as much exempt from state legislation obstructing her traffic. *Gibbons* v. *Ogden*, 9 Wheat., 215, 219.

Congress have not only the exclusive power to regulate commerce, but to make all laws which shall be necessary for carrying into execution that power.

(*Mr. Wilde* then proceeded to show that exchange was an essential part of commerce, and cited many decisions of this court to prove that a state could not retard, impede, or burden, by any device, the operation of the constitutional laws enacted by Congress.)

Mr. Coxe, for defendant in error.

The power of taxing persons carrying on a particular business has been often exercised, and the constitutional power of the states so to act has heretofore not been questioned. In Pennsylvania, for instance, the venders of foreign merchandise are compelled to take out a license, for which they pay a sum graduated according to the amount of their business. Act of May 4, 1841; Purdon, 1153, 1154. A similar tax is imposed frequently by state legislatures, and even by the corporate authorities of cities, and is supposed to be unexceptionable as to its legality.

The provision of the Louisiana statute, which is now called

in question, is to be found in a single section of a general revenue system act.

It does not profess to, nor in fact does it, impose a tax upon a bill of exchange, either in the shape of a stamp duty or otherwise.

It does not profess to, nor in fact does it, impose any restraint upon a party having funds in Louisiana, which he desires to remit abroad, from purchasing a bill of exchange as the instrument of remittance.

*78] *It does not profess to, nor in fact does it, impose any restraint upon a party having funds abroad, which he desires to bring into the state, from drawing a bill of exchange or selling it at his own discretion.

These operations are left wholly unaffected by this law. The section of the law which is objected to acts only upon the persons employed in conducting a particular business,—the trafficking in exchange. They are not the drawers of bills of exchange,—as such, they are not taxed; as buyers, they are not taxed; but as dealing in them, purchasing and selling, they are. It is as their business consists in buying bills drawn by others, on which they make a profit,—as sellers of bills to others, who require them, on which they make a profit,—that they become subject to the law.

That money and exchange brokers are a convenient machine in conducting an extensive commercial business may be true. But they are nothing more. A ship or a steamboat is not only a convenient, but an essential, means of importing foreign merchandise from abroad. Are they the less property, and taxable as such?

Stages and other carriages are not less essentially necessary instruments for the transportation of passengers and commodities between the different states of the Union. Are they therefore exempted from taxation by the states?

Stores and warehouses, in which merchandise is deposited on its arrival in our country from abroad, are absolutely necessary for the transaction of commercial business. Are they therefore beyond the reach of the taxing power of the state in which this kind of property is found?

Mr. Hamilton (Federalist, No. 32) says:—"I am willing to allow, in its full extent, the justness of the reasoning which requires that the individual states should possess an independent and uncontrollable authority to raise their own revenue for the supply of their own wants; and, making this concession, I affirm that (with the single exception of duties on imports and exports) they would, under the plan of the Constitution, retain that authority in the most absolute and unqualified

sense; and that an attempt on the part of the general government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause in the Constitution."

In this case, the law of Louisiana is not obnoxious to any of the objections which have been heretofore presented to the consideration of the court, growing out of the difficulty of giving a precise definition of the words "imports and exports," *and "commerce," or in drawing the almost [*79 shadowy lines which mark the boundaries of the exclusive powers of Congress. A bill of exchange is in no sense either an export or import. It is an instrument, rather than a subject of commerce. The dealing in bills of exchange constitutes no part of the commerce with foreign nations or between the states, however convenient an instrument it may be found in conducting either. The article in which the plaintiff in error deals is a bill of exchange, originating, it may be, within the limits of the state, created and owned by a citizen of the state, and the entire negotiation of which, so far as he is concerned, conducted within the limits of the state.

If this law is objectionable because it affects bills of exchange on the ground that they are the subjects of commerce, upon what principle, it may be asked, can the validity of those state laws be vindicated which regulate the protest of such instruments, or prescribe damages for their dishonor? These are commercial regulations, affecting the interests of all parties to these instruments.

Stress seems to be laid, in the argument submitted on behalf of the plaintiff in error, on the circumstance that the business of his client was exclusively confined to buying and selling bills of exchange drawn on foreign countries or upon other states. He refers to 4 Wheat., 147, in which a learned counsel in his argument says, that the most important medium of foreign commerce is foreign bills of exchange, which are, therefore, important subjects of commercial regulation. The same gentleman, however, adds, that Congress having neglected the duty of legislating on the subject, "the states may and do exercise it, and their rightful use of this power has been sanctioned by this court in innumerable instances." If there was any argument in the first citation bearing upon the case at bar, the additional remark makes the authority a strong one in favor of the judgment under review. Indeed, it may be asserted as a general, if not a universal proposition, that the law on the subject of bills of exchange, whether domestic or foreign, is regulated not by Congress, but is dependent on the local law of the several states, which have adopted, with such

modifications as were thought expedient, the general principles of the commercial law of Europe.

Mr. Justice McLEAN delivered the opinion of the court.

This suit is brought before us, by a writ of error to the Supreme Court of Louisiana.

*80] By an act of the legislature of Louisiana, of the 26th of *March, 1842, entitled "An act relative to the revenue of the state," it is provided in the ninth section, that "each and every money or exchange broker shall hereafter pay an annual tax of $250 to the state, in lieu of the tax heretofore imposed on them." The defendant below having failed to pay the tax for two years, a suit was brought against him in the District Court of the state, in which a judgment for five hundred dollars was rendered. That judgment, on an appeal to the Supreme Court of the state, was affirmed. The defence made was, that the sole business of the defendant was buying and selling foreign bills of exchange, which are instruments of commerce, and that the tax is repugnant to the constitutional power of Congress "to regulate commerce with foreign nations and among the several states."

This is not a tax on bills of exchange. Under the law, every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engage in the business of a money or an exchange broker.

The right of a state to tax its own citizens for the prosecution of any particular business or profession, within the state, has not been doubted. And we find that in every state money or exchange brokers, venders of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who practice the learned professions, and every description of property, not exempted by law, are taxed.

As an exchange broker, the defendant had a right to deal in every description of paper, and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange; and upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce.

What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce? And is the vender of these products exempted from state taxation, because they may be thus used? Is a tax upon a ship, as property, which is admitted to be an instru-

ment of commerce, prohibited to a state? May it not tax the business of ship-building, the same as the exercise of any other mechanical art? and also the traffic of ship-chandlers, and others, who furnish the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one can claim an exemption from a general tax on his *business, within the state, on the ground [*81 that the products sold may be used in commerce.

No state can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the state, it is a subject of taxation by the state. A cotton-broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation.

A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable.

The dealer in bills of exchange requires capital and credit. He generally draws the instrument, or it is drawn at his instance, when he is desirous of purchasing it. The bill is worth more or less, as the rate of exchange shall be between the place where it is drawn and where it is made payable. This rate is principally regulated by the expense of transporting the specie from the one place to the other, influenced somewhat by the demand and supply of specie. Now the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a state in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on.

In the case of *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, 11 Pet., 257, this court held that a state has power to incorporate a bank; and this power has been exercised by every state in the Union, except where it has been prohibited by its constitution. And the banks established, it is believed, have been, without exception, authorized to deal in foreign bills of exchange. And this court held in *Providence Bank* v. *Billings and Pitman*, 4 Pet., 514, that a state had power to tax a bank, there being no clause in the charter exempting it from taxation. In the case of *The Bank of Augusta* v. *Earle*,

18 Pet., 519, it was decided that the bank established in Georgia, having a right in its charter to deal in bills of exchange, could, through its agent and the comity of Alabama, buy and sell bills in that state.

*82] If a tax on the business of an exchange broker, who buys *and sells foreign bills of exchange, be repugnant to the commercial power of the Union, all taxes on banks which deal in bills of exchange, by a state, must be equally repugnant.

The Constitution declares that no state shall impair the obligations of a contract, and there is no other limitation on state power in regard to contracts. In determining on the nature and effect of a contract, we look to the *lex loci* where it was made or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the states have adopted the law merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different states. These laws, in various forms and in numerous cases, have been sanctioned by this court. Indorsers on a protested bill are held responsible for damages, under the law of the state where the indorsement was made. Every indorsement on a bill is a new contract, governed by the local law. Story's Conflict of Laws, 314.

For the purpose of revenue, the Federal government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now the Federal government can no more regulate the commerce of a state, than a state can regulate the commerce of the Federal government; and domestic bills or promissory notes are as necessary to the commerce of a state, as foreign bills to the commerce of the Union. And if a tax on an exchange broker, who deals in foreign bills, be a regulation of foreign commerce, or commerce among the states, much more would a tax upon state paper, by Congress, be a tax on the commerce of a state.[1]

The taxing power of a state is one of its attributes of sovereignty. And where there has been no compact with the Federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the state, which are not properly denominated the means of the general government; and, as laid down by this court, it may be exercised at the discretion

[1] APPLIED. *Paul* v. *Virginia*, 8 Wall., 184.

of the state. The only restraint is found in the responsibility of the members of the legislature to their constituents.

If this power of taxation by a state within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a state may be thereby essentially impaired. But state power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form *of property, real or personal, with the [*88 exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of state regulation and state taxation, and there is no Federal power under the Constitution which can impair this exercise of state sovereignty.

We think the law of Louisiana imposing the tax in question is not repugnant to any power of the Federal government, and consequently the judgment of the Supreme Court of the state is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the state of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed, with costs.

THE UNITED STATES, PLAINTIFFS IN ERROR, v. MCKEAN BUCHANAN.

Commissions for drawing bills of exchange were not usually allowed to permanent pursers in the navy; and on the 10th of November, 1826, commissions for such services to commanders of squadrons and officers of any grade were expressly abolished.

A custom cannot be set up against a settled rule; nor can it ever be binding unless it be ancient, reasonable, generally known, and certain.[1]

There are two books for the government of the officers of the navy, usually known as the "Blue Book" and the "Red Book." The "Red Book," although later in date, did not repeal the "Blue Book," except in some few specified particulars.

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[1] CITED. *Tilley* v. *County of York*, 3 Otto, 163; s. c. 2 Morr. Tr., 351. S. P. *Adams* v. *Otterback*, 15 How., 539; *The Lucy Ann*, 23 Law Rep., 545; *Wilson* v. *Bauman*, 80 Ill., 493; *Mobile &c. Ry. Co.* v. *Jay*, 61 Ala., 247; *Swift & Courtney &c. Co.* v. *United States*, 15 Otto, 691.

The duty of paying mechanics and laborers at the navy-yards was imposed, by the Blue Book, upon pursers who were stationed there. It was made a part of their official duty. As this was not repealed by the Red Book, no commission can be allowed to a purser for performing this service.[2]

The question, whether or not these acts were part of the official duty of pursers, was one of law, to be decided by the court, and not of fact to be left to the jury.

Losses alleged to have been sustained by a purser, in consequence of an order by the commodore forbidding certain sales of slops, cannot be set off in a suit by the United States upon the purser's bond.

The statute of March 3, 1797, which allows set-offs, has for its object the settlement between the parties of their mutual accounts or debts. But wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off.[3]

It appears also that the government is not responsible for a wrong committed by one officer upon another. The party injured has other modes of redress than setting off the damages as a defence, when sued upon his bond by the United States.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Pennsylvania, *having been carried there from the District Court, in which it originated.

*84]

It was a suit brought by the United States against Buchanan, who was a purser in the navy, to recover a balance of $11,585.50, alleged to be due by him. It was brought upon three several bonds, which had been executed by him on the 28th of February, 1836, the 24th of November, 1830, and the 24th of February, 1834. The defence was, that he was entitled to certain credits which the accounting officers of the government had refused to allow.

The items for which the defendant claimed credit were:—

1. Charge of commission for drawing bills of exchange $1,601.86
2. Charge of commissions on payments to mechanics and laborers at navy-yard, Pensacola . 1,955.61
3. Loss of commissions and depreciation of property 9,360.31
4. Loss of commissions on sale of slops . . 885.52

It will be necessary to take up these several items in order, after a few general remarks.

The act of Congress passed on the 7th of February, 1815, (3 Stat. at L., 202,) directed the Board of Navy Commissioners to prepare such rules and regulations as shall be necessary for securing responsibility in the subordinate officers and agents of the navy department. In obedience to this act, the Board of Navy Commissioners prepared a set of "Rules, Regu-

[2] FOLLOWED. *United States* v. *Brown*, 9 How., 500. See Rev. Stat., § 1764.

[3] S. P. *United States* v. *Williams*, 5 McLean, 133; *Ware* v. *United States*, 4 Wall., 617; *United States* v. *Wells*, 2 Wash. C. C., 161.

lations, and Instructions for the Naval Service of the United States," which were published in Washington in 1818. This is the book which is referred to, both in the subsequent arguments of counsel and opinion of the court, as the Blue Book. Its bearing upon the several claims of the defendant, Buchanan, will be mentioned when they come to be noticed *seriatim*.

The Red Book was published at Washington in 1832. Its title was, "Rules of the Navy Department regulating the Civil Administration of the Navy of the United States." The order of the then Secretary of the Navy, prefixed to the book contained the following sentence:—

"The 'Rules, Regulations, and Instructions' for the naval service, as published in 1818, relate to other branches of administration in this department, and, in most particulars, are entirely distinct in their character. They are now undergoing a thorough revision; and when corrected and enlarged, if approved by the competent authority, they will be separately printed and forwarded to those interested in their contents."

In this Red Book, at page 49, there is the following note to chapter 57, which treats of the printed regulations of 1818:—

*"*Note.*—Except in these two particulars, [which [*85
are mentioned in the page to which the note is
attached,] and in others in which they have been expressly amended, these regulations are now in full force; their force being derived from the provisions of the act of Congress of the 7th of February, 1815, and from the sanction of the President and Secretary of the Navy, who have power to adopt any naval regulations, though not within the purview of the act of 1815, if not violating any law of Congress, and if supposed by them to be beneficial in their operation."

We will now take up the separate credits which were claimed by the defendant.

1st. Commission for drawing bills of exchange.

There was no dispute about the amount of bills drawn. A certificate of Mr. Dayton, the Fourth Auditor, stated them to amount to $65,074.34; that they were drawn on the Secretary of the Navy, at various times from the 24th of May, 1827, to the ninth of February, 1828, by whom they were duly honored, and the amount thereof charged to Purser Buchanan on the books of the office.

In 1826, the two following orders were issued by the Secretary of the Navy, in the form of a letter of instruction to the Fourth Auditor.

"*Navy Department, 9th November*, 1826.

"SIR,—Instructions have been transmitted to the com-

manders of our several squadrons abroad, to obtain the funds required for their support from the navy agent near their respective states.

"No percentage or premium will hereafter be allowed to officers of any grade making drafts upon the department, unless they are too remote from the residence of any navy agent to procure the money.

"I am, respectfully, &c.,

(Signed,) SAMUEL L. SOUTHARD.

"TOBIAS WATKINS, ESQ., *Fourth Auditor of the Treasury.*"

"I certify the foregoing to be a true copy of a letter from the Navy Department, on file in this office.

A. O. DAYTON.

"*Treasury Department, Fourth Auditor's Office, July* 5, 1844."

"*Navy Department, 10th November*, 1826.

"SIR,—In reply to the inquiry contained in your letter of yesterday's date, I have to inform you that the allowance of premium or percentage, to officers drawing bills on the department *would cease from the time the officers shall severally receive instructions on the subject.

*86]

"I am respectfully,

(Signed,) SAMUEL L. SOUTHARD.

"TOBIAS WATKINS, ESQ., *Fourth Auditor of Treasury.*"

"I certify the foregoing to be a true copy of a letter from the Navy Department, on file in this office.

A. O. DAYTON.

"*Treasury Department, Fourth Auditor's Office, July* 5, 1844."

2d. Charge of commission on payments to mechanics and laborers at the navy-yard, Pensacola. These payments were made from October, 1835, to December, 1837, and amounted to $91,015.05, on which a commission of 2½ per cent. was charged.

The Blue Book, at page 100, when treating of the duties of a purser, said,—"Every purser of a yard shall settle his accounts at the treasury every twelve months," &c., &c. But it nowhere recognized the allowance of a commission.

3d. Loss of commissions and depreciation of property.

4th. Loss of commissions on sales of slops.

These two items belong to the same head, and must be treated together.

The ship's stores under the purser's control are of two kinds, called public stores, or slops, and private stores. Both descriptions are purchased with the money of the government,

but they are differently situated with respect to the commission which the purser receives upon their issue and consumption by the ship's crew. There was no dispute in this case about the first-mentioned class. The purser claimed a commission of ten per cent., which was allowed to him in the settlement of his accounts. The controversy was confined to the second class.

In May, 1839, the frigate Constitution sailed for the Pacific. She was commanded by Captain Turner, and the defendant was the purser. On board of her was Commodore Claxton, the commander of the squadron on the Pacific station. Early in the year 1840, Commodore Claxton issued an order, that, upon clothing taken from the private stores of the purser, there should not be charged a greater advance than ten per cent. The defendant remonstrated, and a long correspondence ensued; but he was compelled to submit, and during the rest of the voyage he disposed of his stores at that advance, instead of the larger premium to which he considered himself entitled. It is unnecessary to state the particulars of the claim, or the reasons on which it was founded, because the court did not consider it a proper set-off in this action, even if the allegations of the defendant had been well founded.

*The suit was brought by the United States, in the District Court, in May, 1844. It was an action of debt [*87 brought upon the three bonds mentioned in the commencement of this statement. The defendant pleaded *non est factum* and performance, and claimed to set off the items of account above mentioned, which had been rejected by the accounting officers. Before the trial, the counsel filed the following agreement:—

"It is agreed, that, under the pleadings in this case, the question to be submitted, tried, and determined is the correctness of the credits, or any of them, claimed by the defendant in his account current with the United States under his old bond, and under the date of March 1, 1844, and which were disallowed in the reconcilement of his accounts by the Treasury Department, bearing date on the 27th of March, 1844; the said question to be considered as if arising under special pleadings in the cause. Credits claimed, if allowed, to be noted as of the date when they originated, with a view to future adjustment under his respective bonds.

H. M. WATTS,
Of special Counsel for Plaintiffs.

"*May* 16*th*, 1845.

G. M. WHARTON,
For the Defendant."

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The counsel for the United States then offered in evidence,—

1. The above agreement.

2. The three bonds of the defendant.

3. The treasury transcripts, which exhibited a balance due by the defendant to the United States of $11,535.50, with interest from the 1st of March, 1844.

The evidence on the part of the defendant consisted of the correspondence which had passed between himself and Commodore Claxton and others; and also testimony, oral and documentary, upon the respective binding authority of the Blue and Red Books; and also upon the custom and usage of the navy with respect to pursers' commissions. Upon the last point, the United States produced a great deal of counter evidence.

The evidence being closed on both sides, the counsel of the plaintiffs then and there respectfully prayed the court to charge the jury,—

1. That the rules, regulations, and instructions for the naval service of the United States, prepared by the Board of Naval Commissioners, and approved by the Secretary of the Navy, on the 17th of September, 1817, and particularly those under the head of "Pursers," Nos. 12, 13, 14, were in full force, and *obligatory on defendant during the time he served as purser on the Pacific station, from 1839 to 1842, under Commodore Claxton.

*88]

2. That defendant had no right to issue slops, wearing apparel, or materials of which wearing apparel was made, at a greater profit than ten per centum.

3. That the issue of slops and private purser's stores was under the control of the commander, and that it was his right and duty, if he thought the interests of the government and the crew required it, to restrict such issues of private stores.

4. That if the jury believe that upwards of seventy pieces of silk handkerchiefs were issued from the purser's stores without the approval of the commander, such an issue was contrary to the regulations of the service, and justified the commander in restricting the future issues by the purser.

5. That the order of Commodore Claxton and Captain Turner to Purser Buchanan, to limit his profit to ten per cent. on the cost of slops and wearing apparel, and the materials of which wearing apparel was made, was conformable to law and the regulations of the naval service.

6. That the United States are not responsible to the defendant for any supposed loss of commissions and depreciation

of property arising out of the enforcement of the above order, or the conduct of Commodore Claxton.

7. That if the order of Commodore Claxton was illegal, and loss actually resulted to the defendant, the United States would not be responsible in this action.

8. That damages arising out of torts cannot be set off.

9. That unliquidated damages arising out of the conduct of Commodore Claxton to defendant cannot be set off against the claim of the United States in this suit.

10. That defendant, in an action against him by the government, cannot set off a claim which depends upon the pleasure of the government, and is not susceptible of legal enforcement.

11. That the defendant cannot set off prospective profits, which he might have made if he had been permitted to sell to the crew without restraint; nor is the government responsible for any depreciation of property.

12. That there can be no usage recognized by our courts which is contrary to law, and that the evidence given by defendant of a practice to charge twenty-five per cent. on wearing apparel, and materials of which wearing apparel is made, is of a practice contrary thereto.

13. That the charge of two and a half per cent. by defendant, for drawing bills of exchange upon the government, is not warranted by law, and ought not to be allowed.

*14. That the charge of commissions by defendant for disbursing money of the government, in payment of [*89 mechanics and laborers at the navy-yard, Pensacola, is not warranted by law, and ought not to be allowed.

15. That the orders of the Secretary of the Navy, of the 20th of March, 1840, and 2d of December, 1840, were not intended by the Secretary, nor do they or either of them contain an assumption or agreement on the part of the government, to pay any loss of commissions or depreciation of property complained of by Purser Buchanan.

16. That the United States, by the agreement filed by the counsel of both parties in this cause, and the evidence, is entitled to recover a verdict for the sum of $11,535.50, with interest from March, 1844, as appears by the Treasurer's transcript referred to in said agreement.

And the learned judge charged the jury.

And thereupon the counsel for the plaintiffs excepted to said charge generally, and to every part thereof, and in addition to such general exceptions, and without prejudice thereto, specified the following exceptions, viz.:—

That the said judge, in answer to the first, second, third,

fourth, and fifth, and twelfth prayer for instruction, charged the jury,—

"That the commander of a vessel of war has a right to issue orders in relation to the discipline of his ship, and the conduct of his officers on board, and to enforce these orders, he being responsible for any abuse of it. It is also his right to control the issues of stores by the purser, and, if he thought the interest of the government or of the crew required it, to restrict the issues of such stores to a proper quantity; but he had no right to reduce or control the prices at which such stores should be issued, that being fixed by the rules and regulations, and the usages and customs, of the navy. Was there, then, a fixed price or rate of advance which the purser had a right to charge on these articles, and if so, what was it? And was it charged by the order of Commodore Claxton?

"On behalf of the United States, it is contended that the rules and regulations prepared by the Board of Navy Commissioners, and published in 1818, were in full force, and that by these, 'all articles of wearing apparel, and materials of which wearing apparel is made, to be charged as slops,' and an advance of ten per cent. only allowed.

"It is admitted, that, so far as these rules and regulations are not opposed to an act of Congress, and subsequent rules and regulations they are in force; but is it contended that these *do not extend to the private stores of the purser, but only to those purchased by the government; or if they do, that the rule is superseded by the regulations issued in 1832, which were in full force in 1839–40.

*90]

"I deem it unnecessary to detain you by an examination of the first view, as I think the last is correct; although the rule or section referred to in the Red Book, on the face of it, purports to bear date 27th July, 1809, and may have been suspended by the rules of 1818 (as to which, however, it is unnecessary to decide). I consider the incorporation of it in the rule of 1832 as a new issue of that date, and binding from the time of its promulgation, although it may conflict with the rules of 1818.

"Each successive secretary or head of a department has the same right as his predecessor to give a construction to the laws, or regulations, or usages, of the business of his department; and the construction given by the last will be binding until changed by his successor. This construction of the rules of 1832 has been adopted, not only by the accounting officers of the government, but by Congress. (See an act for the relief of E. B. Babbit, March 2d, 1833.) The rules of 1832 provide that twenty-five per cent. should be allowed upon

articles of secondary necessity, embracing it, &c. (See Red Book, p. 18.)

"Are these articles of private clothing, and the materials of which such clothing is made, such as are furnished by pursers, articles of secondary necessity? This is a question for the jury to determine. From the evidence, it appears that the articles furnished by the purser are of a finer material than those provided by the government, and have generally been considered in the service as a holiday or shore dress for the seamen. They are not required to purchase them, but do so at their own pleasure. A number of witnesses have been examined, who proved it to have been the custom and usage to charge upon these articles an advance of twenty-five per cent., and that they were considered of secondary necessity. It is true there can be no usage recognized by the courts which is contrary to law. Usage cannot alter the law, but it is evidence of the construction given to it; and when the usage is established, it regulates the rights and duties of those who are within its limits. But it is said a different construction was given to these regulations by Secretary Paulding, and that he confirmed the view and construction of Commodore Claxton.

"If the order of Commodore Claxton had been confined to supplies purchased subsequent to the receipt of this general order, then there might have been force in this argument; but no *change of a usage, even by authority, [*91 can have a retrospective effect, but must be limited to the future."

And in answer to the sixth and fifteenth prayers for instruction, the learned judge charged the jury,—

"It is, however, said, supposing all these doings by Commodore Claxton to have been wrong, still the government is not liable for his acts, and therefore the defendant is not entitled to a set-off in this action, although he may have sustained damages by them. For the purpose of this case, and with a view of obtaining your verdict on the merits of this claim, I state the law to be, that Commodore Claxton was the agent of the government in all this transaction, and although his acts may not have been previously authorized by the government, yet if they were afterwards ratified by the Secretary of the Navy, with a full knowledge of the facts, as they appear to have been, then the government is responsible for any loss occasioned by his orders so ratified or confirmed."

In answer to the seventh, eighth, and ninth prayers of the plaintiffs for instruction, the judge charged the jury,—

"Again it is contended, that, supposing all the allegations

on part of the defendant to have been fully made out by the evidence, yet this is not such a claim as can be set off against the demand of the government in this action. However this might be in suits between individuals, the government of the United States does not resort to technicalities to screen it from a just claim by any of its citizens. The act of 3d March, 1797, directs, not only that legal, but that equitable, credits should be allowed to the debtors of the United States by the proper officers of the Treasury Department, and if then disallowed, that they may be given in evidence at the trial; and this whether the credits arise out of the particular transaction for which he was sued, or any distinct or independent transaction, which would constitute a legal or equitable offset or defence, in whole, or in part, of the debt sued for by the United States.

"If, therefore, you believe the defendant has sustained injury by the order of Commodore Claxton, which, according to these principles, was contrary to law in limiting the prices, and which order was subsequently approved by the Secretary of the Navy, having a full knowledge of the facts, you will, from the evidence, ascertain the amount of such loss, and credit the defendant with it as an equitable defence against the claim of the government. In ascertaining this amount, you will recollect that the prohibition of Commodore Claxton as to price applied only to clothing, or materials of which clothing is made, and to no other articles of secondary necessity."

*92] *In answer to the tenth and eleventh prayers of the plaintiffs for instruction, the judge charged the jury,—

"It is incumbent on the defendant to satisfy you of the amount of credit to which he is entitled under this head. In estimating it, you are to allow only the actual loss sustained by him, and not any prospective or anticipated profits which might have been made by the defendant, supposing his whole stock to have been sold at the prices claimed by him.

"If, in consequence of this order, the goods remaining on hand were injured or damaged, he is entitled to recover the amount of such damage; but the jury will determine whether such damage was caused by this order, and whether the sales were lessened in quantities in consequence of the reduction of price. The sales made on shore, and those to other pursers, are not such sales as would entitle him to charge the government with the advance of twenty-five per cent. on cost; but if made *bonâ fide*, with a view to reduce an anticipated loss, he will be entitled to be made good his actual loss on such sales."

In answer to the thirteenth and fourteenth prayers of the plaintiffs for instructions to the jury, the judge charged,—

"The second and third items of claim are for commissions on moneys paid by the defendant to mechanics and laborers, when stationed at the navy-yard at Pensacola, from October, 1835, to December, 1837; and a commission on the amount of bills of exchanges drawn by him on the government, from May, 1827, to February, 1830.

"These are alleged to be extra services, for which, by the custom of the department, he is entitled to extra compensation.

"From the rules and regulations of 1818 and 1832, as given in evidence, it appears that both the drawing of bills of exchange by the pursers when abroad, and the payment of mechanics and laborers by them, when stationed at navy-yards, were duties devolved on and usually performed by pursers.

"But if, from the evidence, the jury believe that these duties were required of, and were performed by, the defendant over and above the regular duties of his appointment, and that it has been the practice of the government or Navy Department to allow to pursers compensation on commissions over and above the regular pay, and that the defendant took upon himself the labor and responsibility of such payments and drawing of bills, with an understanding on both sides that he should be compensated for the same as extra services, then it is competent for the jury to allow such sum as they may find to be reasonable and conformable to the general usages of the government in like cases. But the custom and usage which has been *invoked by the defendant in his favor, must also operate when it is established against him. The usage, to be binding, must be uniform, and be applicable to all officers of the same grade, under similar circumstances. It is not sufficient that one, two, or half a dozen officers have been allowed an extra compensation for such services, unless the rule was a general one, so that each officer performing the service might be supposed to rely on the known practice of the government to allow extra compensation at the time the service is performed. The jury will say, whether the few cases in which extra compensation is proved to have been allowed are not rather exceptions to the general rule of refusing such compensation, than proof of the rule itself. [*93

"My opinion is, that the weight of the evidence is against the claim of the defendant for either of these items."

And thereupon, the counsel for the said plaintiffs did then and there except to the aforesaid charge and opinions of the said judge, on the several points upon which his instructions were prayed for, to the jury. And inasmuch as the charge and opinions, so excepted to, do not appear upon the record, the said counsel for the plaintiffs did then and there tender

this bill of exceptions to the opinion of the said judge, and requested the seal of the said judge should be put to the same, according to the form of the statute in such cases made and provided. And thereupon, the said judge being so requested, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such cases made and provided.

[L. S.] ARCHIBALD RANDALL, *District Judge.*

The jury, under the above instructions of the court, found the following verdict:—

"We, the jury, impanelled in the case of the *United States* v. *McKean Buchanan*, a purser in the navy, find that there is due by the plaintiffs to the defendant the following sums, to wit:—

Commissions on the payment of mechanics and laborers at the navy yard, Pensacola.....	$2,275 38
Interest on the same.....	1,024 00
Commissions on drawing bills of exchange.....	1,626 86
Interest on the same.....	1,455 00
Loss on sales on board the frigate Constitution..	385 52
Loss of commissions.....	5,277 46
	$12,044 22
Deduct government claim.....	11,535 50
Due Purser Buchanan.....	$508 72"

*94] *The counsel for the United States then moved for a new trial, objecting, amongst other things, to the allowance of interest, where no such claim was made by the defendant. Whereupon the counsel for the defendant filed a *remittur* for the two sums of interest, amounting together to the sum of $2,479, and agreeing that a judgment might be entered against him in favor of the United States for $2,148.99.

The court overruled the motion for a new trial, and directed a judgment to be entered accordingly.

By the above bill of exceptions, the case was carried to the Circuit Court, which, on the 9th of November, 1846, affirmed the judgment of the District Court.

The United States brought the case up, by writ of error, to this court.

It was argued by *Mr. Gillet* and *Mr. Johnson* (Attorney-

General), for the United States, and *Mr. G. M. Wharton* and *Mr. Dallas*, for the defendant in error.

The brief filed by the Attorney-General made the following points:—

I. That the court erred in the charge given as to commissions on bills drawn by the defendant, and payments made by him to mechanics and laborers at the navy-yard; because, whether these commissions were to be allowed was a question of law for the court, depending upon the rules and regulations of the navy, which do not warrant them. 1st. By the rules and regulations it was the defendant's duty to perform the services for which the charges were made. 2d. No parol evidence was admissible to the contrary. 3d. And, in fact, there was no evidence from which the jury were at liberty to infer that the services for which the charges were made were extra to those which he was in duty bound to perform under the rules and regulations, or that there was any practice or usage under which he could be paid for the same. 4 How., 80; 2 Wash. C. C., 24; 3 Id., 149; Gilp., 372; 6 Binn. (Pa.), 417.

II. That the court erred in charging the jury that the rules on the subject of pursers' commission on supplies furnished to the crew, established by the Blue Book of 1818, were superseded and repealed by the republication of the rule of 1809, in the Red Book of 1832; whereas the Red Book declares that the rules contained in the Blue Book, except in two particulars mentioned, and others which have been expressly amended, were in full force for the reasons assigned. That the regulations as to pursers' commissions on articles furnished to the crew in the Blue Book are questions of law, and the true construction *of them is, that pursers are entitled [*95 to dispose of slops, and articles of wearing apparel, and of materials of which it is made, at a commission or profit of ten per cent. only. That the regulation of 1809, allowing twenty-five per cent. upon articles of secondary necessity, if it ever included wearing apparel, or materials of which it is made, was superseded and repealed by the regulations of 1818, which directed them to be charged as slops, and was not revived by the republication in 1832. And that the secondary articles mentioned in the regulations of 1809 were defined in the regulations of 1818 to be soap and the other articles enumerated, (wearing apparel, or materials for it, not being among them,) and upon these, by the regulations of 1818, pursers were to be allowed to charge twenty-five per cent.

III. That the court erred in charging the jury that the

unliquidated damages for commissions and losses could be set off in this action at all; and also erred in charging that the United States were liable for them, if incurred by Commodore Claxton; and in stating the law to be, that the Commodore was the agent of the government; and that although his acts may not previously have been recognized, yet, if they were afterwards ratified, with a full knowledge of the facts, as they appear to have been, then the government is responsible for any loss occasioned by his orders, so ratified or confirmed. 9 Pet., 319; 2 Wash., C. C., 131, 161; 13 Wend. (N. Y.), 139, 156, 157; 4 Mason, 482; 5 Id., 425, 439; 10 Pet., 80; 4 Serg. & R. (Pa.), 249; 5 Id., 122; 10 Id., 14; 4 Watts & S. (Pa.), 205, 214.

IV. That there was error in the judge's charge, in answer to the tenth and eleventh prayers;—1st. Because the tenth was not granted when it should have been; and, 2d. Because that part of the charge in which he told the jury that "the sales made on shore and those to other pursers are not such sales as would entitle him to charge the government with the advance of twenty-five per cent. on cost; but if made *bonâ fide*, with a view to avoid an anticipated loss, he will be entitled to be made good his actual loss on such sales," was erroneous, —the United States, under the circumstances, not being liable for such loss, as the jury were, by this instruction, authorized to charge them with.

V. That the court erred in allowing the defendant to turn the verdict in his favor into a verdict against him, by allowing him to remit, without the consent of the United States, and by entering up judgment in their favor without their consent, and contrary thereto. And because the said judgment, even as so
*96] corrected, is erroneous, as it includes commissions on drawing *bills and making payments to mechanics and laborers at the navy-yard, and losses on alleged sales on board, and loss of commissions.

The brief of the counsel for the defendant in error presented the following points:—

1. That at the time when the alleged claim of the government against the defendant, and the alleged credits of the defendant, arose, there was no law of the United States expressly defining the duties or the emoluments of a purser in the navy of the United States; but that the said duties and emoluments were regulated by the rules and regulations of the navy, by orders from the Navy Department, and by usage or custom.

2. That the rules and regulations prepared by the Board of

Navy Commissioners, and published in 1818, called the Blue Book, did not extend to the private stores of the purser, but only to those purchased by the government, and were not the rule regulating the charge of commissions by the defendant on the sale of private clothing, or the materials of which it was made, or of tea, sugar, and tobacco, during the period in which the present controversy originated.

8. That the said rules of 1818, if ever applicable to said subject-matters, were superseded to that extent by the rules of 1832, called the Red Book; and that these latter rules regulated the duties of the defendant and his emoluments, as to the said subject-matters of controversy in this suit.

4. That there is no error in law in the charge of the district judge, nor in the record, upon the subject of the credits claimed by the defendant for commissions on paying mechanics and laborers at the Pensacola navy-yard, and on drawing and negotiating bills of exchange; that the said claims of the defendant depended upon the finding by the jury of certain facts in relation to which evidence had been submitted on both sides, and that the finding of those facts conclusively establishes the right of the defendant to claim said credits.

5. That this court cannot revise the finding by the jury of the facts in controversy, nor grant a new trial, nor reverse the judgment below, except for error in law appearing on the judge's charge, or on the record.

6. That the defendant was entitled to all the emoluments of his office, which, by express or implied contract with the United States, belonged thereto; and that the existing regulations of the naval service, and the existing custom and usage of the navy, defined and formed a contract between the government and the defendant in this respect.

*7. That the defendant properly expended the money [*97
which he received from the United States for that purpose, and with which he is charged in account, and which is sought to be recovered back from him in this suit, in the purchase of the customary private stores; and that he was entitled to sell said stores, in conformity with the rules of the ship, to the officers and crew of the Constitution, at prices regulated by the existing rules and usage of the service; and that he could not lawfully be compelled to sell them at lower rates, nor without a breach of the contract with him.

8. That defendant, as an inferior officer, was by law obliged to submit to the orders of Commodore Claxton in the premises; and that by so submitting he lost none of his rights as purser, but is entitled to assert them in this suit.

9. That the ratification of the said Commodore's conduct in

the premises by the Secretary of the Navy, with a full knowledge of the facts, rendered the United States liable for any loss sustained by the defendant resulting from a breach of contract as aforesaid, and from the orders of said Commodore, so ratified; and that the Secretary had no right to diminish the established rates of profit with respect to stores purchased by defendant prior to such diminution.

10. That, under the evidence in the cause, it was right to submit to the jury, as a question of fact, what were "articles of secondary necessity;" and also to charge them, that, if they were satisfied from the evidence of the existence of a usage to consider clothing, and the materials whereof clothing is made, as such articles, and to charge an advance thereon of twenty-five per cent., such usage was evidence of the construction given to the law, and regulated the rights and duties of those acting within its limits.

11. That there was no error in charging that the defendant was entitled to a credit for the actual loss proved by him to have been sustained in consequence of being compelled to sell his stores at the advance of ten per cent. only, if he were authorized to charge an advance of twenty-five per cent. on the same. Nor in charging that he was entitled to such credit for all actual loss in consequence of the said order of Commodore Claxton.

12. That there is no error in law in the charge of the district judge.

13. That the defendant was entitled to set off all equitable as well as legal credits which he had, and had duly preferred
*98] against the United States; and that his claims in this case, if *found by the jury, were equitable credits, which he had a right to set off against the plaintiffs' claim.

14. That there was no error in allowing the defendant to remit a portion of his credits, as allowed him by the jury; nor in entering the judgment accordingly.

Upon the first point, the counsel for the defendant in error cited the case of *United States v. Tingey*, 5 Pet., 115, 126, and a circular from the Navy Department dated March, 1832.

The pay from the treasury to pursers was regulated by the act of 18th April, 1814, § 1, (3 Stat. at L., 136,) which provided, that "the pay and subsistence of a purser should be forty dollars per month, and two rations per day."

By the act of March 3d, 1835, (4 Stat. at L., 755, 757,) it was provided, that "no allowance shall hereafter be made to any officer in the naval service of the United States, for drawing bills, for receiving or disbursing money, or transacting any business for the government of the United States," &c.

The act of August 26th, 1842, (5 Stat. at L., 535,) introduced a new system with reference to pursers, and provides, section 3, that, "in lieu of the pay, rations, allowances, and other emoluments authorized by the existing laws and regulations, the annual pay of pursers shall be as follows," &c. This act also provided for the purchase of all supplies for the navy to be made with the public money, under regulations to be prescribed by the executive. And pursers are prohibited thereafter from "charging any profit or percentage upon stores or supplies to persons in the naval service, other than those thereinafter prescribed."

The Red Book, p. 18, provides, under the head of "Allowance to Pursers," as follows:—

"§ 1. An allowance of commission of 2½ per cent. upon payments made by pursers is of ancient date.

"§ 2. Pursers are allowed a commission of 5 per cent. on the amount of sales of dead men's clothes. They are also allowed 5 per cent. upon clothing distributed to the crew. January 29, 1803.

"25 per cent. upon articles of secondary necessity, embracing all articles not denominated luxuries, upon which 5 per cent. is not charged. 27 July, 1809.

"50 per cent. upon luxuries, such as tea, coffee, sugar, and tobacco, when furnished either to officers or crew.

"In vessels of 20 guns, an additional allowance is made upon groceries of 5 per cent., and in vessels under 20 guns, of 10 per cent. upon the same articles."

*Red Book, p. 50:— [*99

"§ 1. Pursers must transmit to the Navy Commissioners a certified invoice of all articles provided by them for vessels bound on a cruise, including all articles procured to be sold for their own benefit. October 20, 1830."

"§ 3. All bills of exchange drawn by pursers on the department must be in favor of and indorsed by the commander of the vessel or squadron. A separate letter of advice must accompany each bill, stating (among other things) the rate of exchange at which the bill is negotiated, &c., &c. August 10, 1824."

Upon the second point, the counsel for the defendant cited numerous passages from the Blue Book, to show the rate of advance which pursers might charge upon what are called "private stores;" but as the court did not decide the point, these references are omitted.

3d point. The counsel contended that the issue of the Red Book, by competent authority, superseded the Blue Book in the matter of the emoluments of pursers. *United States* v.

McDaniel, 7 Pet., 14; Act of Congress of March 2, 1833, for the relief of E. B. Babbit.

Upon the fourth, fifth, sixth, seventh, and tenth points, on defendant's brief, it is submitted, that, if the duties and emoluments of the purser were regulated by no statute, but dependent upon rules and usage, it was the duty of the district judge to submit the question of fact to the jury, what the usage in the matter was, under the evidence presented on both sides; and that he was right in directing them to regulate their verdict in accordance with their view of the usage.

Although there can be no usage recognized by the court which is contrary to law,—and usage cannot alter the law,—yet it is evidence of the construction given to it; and when the usage is established, it regulates the rights and duties of those within its limits. 7 Pet., 14, 15, before cited.

Allowances and emoluments were recognized by statute, as belonging to pursers; and, of course, they were entitled to these, as matter of contract, whenever they rendered the proper service. As specially applicable to the fifth point, the counsel for defendant cited *Henderson* v. *Moore*, 5 Cranch, 11; *Barr* v. *Gratz*, 4 Wheat., 213; *Blunt's Lessee* v. *Smith*, 7 Wheat., 248; *Brown* v. *Clarke*, 4 How., 4; *Zeller* v. *Eckert*, Id., 298.

The jury have found the fact, that the defendant performed these duties upon request, over and above the regular duties of his appointment, that it has been the practice of the government to allow to pursers extra compensation, and that the
*100] defendant *performed these particular services, with an understanding on both sides that he should be compensated for them as extra services. Surely there can be no legal objection, under these circumstances, to the defendant's claim, upon this head.

As to the eighth and ninth points, it is remarked, that the Navy Commissioners' Rules, p. 21, section 10, provide,—"If any officer shall receive an order from his superior, contrary to the general instructions of the Secretary of the Navy, or to any particular order he may have received from the said Secretary of the Navy, or any other superior, he shall represent in writing such contrariety to the superior from whom he shall have received said order; and if, after such representation, the superior shall still insist upon the execution of his order, the officer is to obey him, and to report the circumstances to the commander of the ship, to the commander of the fleet or squadron, or to the Secretary of the Navy, as may be proper."

This mode was strictly pursued by the defendant; and he, of course, lost none of his rights by obeying the law.

Upon the eleventh and twelfth points on defendant's brief, it is submitted, that the defendant received, by the verdict and judgment below, no allowance or equitable credit, except as a compensation for actual loss theretofore sustained by him, in consequence of the erroneous construction of the rules regulating his compensation on the part of the officers of the government. He being entitled, by contract and law, to dispose of the stores, which had been purchased by him prior to any change of existing regulations, at a fixed rate; and having been compelled by his superior officer, (whose orders were subsequently ratified by the government,) to part with them at a less rate,—or, in other words, the credit arising from sales made by him, to which he was entitled as an offset against the money placed in his hands by the government, being illegally diminished by the auditing officers of the United States,—he is at liberty in a suit against him, brought to recover the balance of money in his hands, to assert his rights to the proper rate of profit, and to defalk that from the debit side of his account. The government having deposited in the purser's hands a sum of money, with authority and instructions to buy certain goods therewith, and to dispose of them at fixed rates, cannot, after his purchase and subsequent disposition of these goods, call upon him to refund the money, without an allowance to him of the rates of profit originally agreed upon between them. If, for example, he bought an article, with the government money, for fifty cents, which he was entitled to dispose of for *seventy-five [*101
cents, and the United States subsequently compel him to sell it for sixty-two and a half cents, they cannot, in calling him to account for the money intrusted to him, deny his right to charge them with the difference of twelve and a half cents, which would make up his legal profit on the transaction. They become, in equity, bound themselves to reimburse him for the actual loss of profit accruing from their act. And such was the judge's charge. He instructed the jury to allow "only the actual loss sustained by the defendant, and not any prospective or anticipated profits." *United States* v. *Hawkins*, 10 Pet., 125, shows the manner in which the purser's accounts are adjusted at the treasury.

Upon the thirteenth point, the following authorities are adduced (a part of these authorities are also applicable to the fifth point):—*United States* v. *Ripley*, 7 Pet., 18; *United States* v. *McDaniel*, Id., 1; *United States* v. *Fillebrown*, Id., 28; *United States* v. *Wilkins*, 6 Wheat., 135.

The same general principle as to the right of set-off is laid down in *United States* v. *Robeson*, 9 Pet., 319; *United States* v. *Bank of the Metropolis*, 15 Id., 377.

Mr. Justice WOODBURY delivered the opinion of the court.

This is a writ of error, presenting three distinct grounds of exception to the judgment rendered in the court below.

Neither of these is claimed to justify us in revising the finding of the jury on the evidence, though the verdict was not acceptable in some respects to the district judge who tried the cause, but should have been scrutinized by him, if at all, and, if clearly wrong, submitted to another jury for correction on the motion for a new trial. The exceptions to be now considered, are, therefore, confined to the instructions given to the jury concerning the claims made in set-off by the original defendant, and are, that they all were, in point of law, incorrect.

Those claims were,—

1st. For commissions for drawing bills of exchange.

2d. For commissions on payments made to mechanics and laborers at the navy-yard at Pensacola.

3d. For loss of commissions on sales of slops, and loss by depreciation of property in the Pacific.

The claim for commissions for drawing bills of exchange is founded on such service, performed at times from May, 1827, to February, 1830. But it appears that such commissions were not, at any period, usually allowed to permanent pursers. And though one or two instances were given of such allowances under peculiar circumstances, they were limited *to that number; and on the 10th of November, 1826, commissions to commanders of squadrons, and "officers of any grade," for drawing such bills, were expressly abolished. (Red Book in the Navy, p. 10 and p. 27. See also Letter of 4th Auditor, 26th June, 1844; Circular, 1st April, 1833.)

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When the present claim was presented to the department by Mr. Buchanan, in 1831, it was, therefore, rejected, and seems to have been abandoned by him for nearly ten years after, when, another difficulty arising as to other transactions of his in the Pacific, this claim was revived, and offered in set-off to a suit by the government for moneys then recently advanced to him.

On what ground, then, could the district judge properly leave its allowance to the jury, as he did at the trial in this case? It seems to us, that he should have instructed them that, in point of law, neither any act of Congress, nor any regulation of the department, justified the allowance; that

the service performed was an ordinary one, connected with a purser's official duties, and consequently, for which, in point of law, he was entitled to no extra compensation by way of commissions or otherwise. (See *Gratiot* v. *United States*, 4 How., 112.)

The two cases, often relied on to justify such an allowance, were both claims for what was deemed by the court extra service. (*United States* v. *McDaniel*, and *United States* v. *Fillebrown*, 7 Pet., 16 and 28.)

On the subject of a usage or custom, attempted to be proved, to overturn these principles and decisions, it seems to us that the judge should have ruled, that a usage ought not to be permitted to be set up, where a rule, as here, is not doubtful, but settled. (*Brown* v. *Jackson*, 2 Wash. C. C., 24; 6 Binn. (Pa.), 417.) And that a usage or custom, when admissible, must, in order to be valid, be ancient, reasonable, and generally known (3 Wash. C. C., 149), and also be certain (*United States* v. *Duval*, Gilp., 372). Consequently, when it appeared here that the compensation was fixed or clear, and when it appeared that only one, or at the furthest, two extra allowances could be proved of commissions for such services by permanent pursers, and those under peculiar circumstances, he should have directed that, in point of law, these last did not constitute a valid usage or custom, and that there was nothing properly to be left to the jury on the subject. In the *United States* v. *McDaniel*, 7 Pet., 16, the usage had existed uninterruptedly for fifteen years.

There is a very good description of a custom or usage in ch. 1, art. 3, of the Civil Code of Louisiana:—"Customs result *from a long series of actions, constantly [*103 repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent." How imperfectly the evidence in the present case meets the requirements of such a definition as this, or of any legal view of a valid usage, is so obvious as not to need further explanation.

The second claim, for paying mechanics and laborers at the navy-yard at Pensacola, from 1835 to 1837, stands in a similar condition. It was a service expressly imposed on a purser of a yard as official, by the Blue Book of the navy, as early as 1818 (p. 14).

But the judge instructed the jury, that this book had ceased to be in force. In this he erred. For the navy department, in 1831, had expressly and officially published, that it was still "in full force," except in two or three other particulars, specified in a note to the Red Book (p. 49, note). The lat-

ter, also, was then first printed, and not only did not profess to repeal the former, but such was not its legal effect. The Blue Book related chiefly to other matters than what were in the Red Book, and which were as necessarily to remain regulated by the former after the publication of the latter as before, and even now as then.

The Blue Book concerns the complement of officers and men for vessels of different sizes, the duties of those officers on shipboard and at yards, salutes, recruiting, &c.; and not, like the Red Book, relating to decisions in the civil administration of the department, and circulars, orders, &c., connected with it.

The latter was a mere collection of these latter matters, before existing dispersed and in manuscript; and being compiled and printed for the benefit of navy officers, as well as the department, the date of each decision and circular was given, so that officers might see, if decisions, regulations, or circulars conflicted in any degree, as they sometimes might, which was of most recent date, and consequently often modifying or superseding one made earlier. The Red Book introduced nothing new into the service, nor professed to do it, but merely arranged and made more generally known by printing, in 1831, what had before taken place on the matters described in it, as had been done in relation to some matters in the Blue Book, by printing and distributing that in 1818, as well as compiling and publishing in that other things new and permanently useful.

There being, then, no repeal of this part of the Blue Book relating to the duties of pursers at yards, the payment of *104] *mechanics and laborers stood, as ever since 1818, if not longer, an official duty of pursers stationed at them.

The idea of attempting to set up a usage to pay commissions for this service, and leave merely one case of the kind to the jury as evidence of such a usage, was altogether untenable on sound principles, as before shown under the first claim. All the other cases referred to in support of such a usage or custom were not cases to allow commissions, though sometimes to sanction a sum of money for a clerk.

But even this last had been abolished as early as 1826, long before the service performed by the original defendant, and only an additional steward had been since allowed at yards where the workmen were numerous. (Red Book, 52. See Letter of 4th Auditor, June 26, 1844, and Circular of 1st April, 1833.)

There is, likewise, another defect in the instructions to the jury on both of these points, in permitting the testimony of

naval officers, and sometimes of subordinate ones, rather than the head of the department, to go to the jury to enable them to decide what were and were not official duties, when it was rather the province of the court, after being duly informed from proper sources, to settle that as a question of law, and direct the jury upon it. (4 How., 80; 6 Binn. (Pa.), 417.)

The third ground of claim, and the instructions upon it, are in some respects different, and remain to be considered.

This claim was for commissions lost on the sale of slops and for depreciation in property, caused by orders of Commodore Claxton in the Pacific in 1839.

The latter, finding that an unusual quantity of some kinds of clothing had been issued by the defendant from his private stores, on which an advance of twenty-five per cent. had been charged, and only a small quantity from the public stores, on which only ten per cent. advance was charged, interposed and issued an order against taxing the crew over ten per cent. advance on certain articles of wearing apparel, on which the defendant insisted he was entitled to twenty-five. This claim is for a loss of the difference between ten and twenty-five per cent. on what was and might have been sold, and loss by depreciation on articles not sold. Considering the views entertained by this court on the impropriety in law of allowing this claim to be put in at all in set-off to this action, it is not necessary to decide here which percentage was the proper one.

On the one hand, the opinion of the Commodore was sustained by that of Mr. Paulding, then Secretary of the Navy, —presumed to be best acquainted with the previous constructions *in the navy department,—and by the express [*105 language of the Blue Book (pp. 103 and 105), and by some early decisions published in the Red Book (p. 18), as well as by the views of some of the members of this Court; yet other constructions of these decisions tend to sustain the claim, as do the views of other members of this court.

Whichever of these constructions, then, may be correct, is not now settled, because we think it clear, that such a claim as this is not allowable at all by way of set-off to an action brought by the government.

The statute of March 3d, 1797, which allows set-offs, has had a very liberal construction by this court, extending it to matters even distinct from the cause of action, if only such as the defendant is entitled to a credit on, whether equitable or legal. (*United States* v. *Wilkins*, 6 Wheat., 135; *Ripley* v. *United States*, 7 Pet., 25.)

The object is to settle between the parties their mutual accounts or debts. (See the Act of Congress.)

But any wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off. (*Butts* v. *Collins*, 13 Wend. (N. Y.), 156; *McDonald* v. *Neilson*, 2 Cow. (N. Y.), 140; *Heck* v. *Sheener*, 4 Serg. & R. (Pa.), 249; 10 Id., 14.) This rule prevails when the United States are plaintiffs, as well as individuals. (*United States* v. *Robeson*, 9 Pet., 325.)

Much less could wrongs done by others than the United States, and for whom it would be a very grave question whether the United States were in law responsible, be set off, and unliquidated damages allowed.

Such a transaction, whether sounding *ex delicto* or *ex contractu*, seems to be one between the two officers, rather than between one of them and the government. (*United States* v. *Hawkins*, 10 Pet., 184; 9 Id., 319.)

It is certain, that no action could technically be sustained against the United States for any wrong done here by Commodore Claxton. And, waiving their sovereignty to bar a suit, it is quite manifest that no claim exists as a matter of course against the government for a wrong done by one officer against another officer, or by one officer against an individual, when the liability of the officer himself for public acts is often questionable; and when the liability of the government for his acts, private or public, is still more in doubt. (*Garland* v. *Davis*, 4 How., 148, and cases there cited; Story on Agency, 412, *n.*; *Duncan* v. *Findlater*, 6 Cl. & F., 908, 910.)

*106] Nor does it alter the case, if another officer, *like a secretary of the navy, approves of the wrong. Should a post-captain go out of the path of his duty, or act beyond his legitimate authority, it appears on its face an affair between him and the sufferer, and not between the latter and the government.

The defendant, if he has really been wronged by Commodore Claxton, acting against and beyond his official authority, has not only the usual modes of redress against him in the judicial tribunals, (*Jones* v. *Bird*, 5 Barn. & Ald., 837; 15 East, 384,) but it is gratifying to reflect, that resort to Congress is also open for relief, and with success, undoubtedly, should the defendant be able to satisfy Congress he was wronged by the Commodore, and that it is just and proper for the government to atone for any injury so done to him by another.

But some legislative sanction to this claim, or some recognition by Congress of a right to it, would seem an indispensable

preliminary to its allowance in any form in the judicial tribunals against the government. See *United States* v. *McDaniel*, 7 Pet., 2 and 16.

Judge Story in his work on Agents (§ 319) says:—"In the next place, as to the liability of public agents for torts or wrongs done in the course of their agency, it is plain that the government itself is not responsible for the misfeasance, or wrongs, or neglects or omissions of duty, of the subordinate officers or agents employed in the public service."

This view is sustained by several adjudged cases, among which are the *United States* v. *Kirkpatrick*, 9 Wheat., 720, and 8 Wend. (N. Y.), 403; *United States* v. *Vanzandt*, 11 Wheat., 190; 1 Pet., 318; 5 Mason, 441; 15 East, 393; 6 Cl. & F., 903.

Consequently the judge in the District Court erred in law by permitting a set-off, composed of such a claim, to go to the jury at all. There being error in the instructions on all the three claims, and the judgment in the Circuit Court having affirmed that in the District Court, it must be reversed and one entered disaffirming it, and the case remanded thence to the District Court, in order that there may be a *venire de novo* in that court, and another trial had in conformity to these views.

Mr. Justice McLEAN and Mr. Justice GRIER dissented from the above opinion.

Mr. Justice WAYNE did not sit in the cause.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the *Eastern District of Pensylvania, and was argued [*107 by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court affirming the judgment of the District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to enter a disaffirmance of the judgment of the District Court, and to remand this cause to the said District Court, with directions to that court to award a *venire facias de novo*, and for further proceedings to be had therein in conformity to the opinion of this court.

THOMAS WILLIAMS, ADMINISTRATOR OF BENJAMIN J. BALDWIN, DECEASED, APPELLANT, *v.* JOHN W. AND WILLIAM BENEDICT, TRADING UNDER THE FIRM AND STYLE OF BENEDICT & BENEDICT.

The laws of Mississippi direct that, where the insolvency of the estate of a deceased person shall be reported to the Orphans' Court, that court shall order a sale of the property, and distribute the proceeds thereof amongst the creditors *pro rata*, and that in the mean time no execution shall issue upon a judgment obtained against such insolvent estate.

A judgment obtained against the administrator *before* the declaration by the Orphans' Court of the insolvency of the estate, is not, upon that account, entitled to a preference; but must share in the general distribution.[1]

But this court expresses no opinion as to the right of state legislation to compel foreign creditors, in *all* cases, to seek their remedy against the estates of decedents in the state courts alone, to the exclusion of the jurisdiction of the courts of the United States.[2]

THIS was an appeal from the District Court of the United States, for the Northern District of Mississippi, sitting as a court of equity.

The appellant, Thomas Williams, was complainant below, in a bill setting forth, that letters of administration on the estate of Benjamin J. Baldwin, deceased, were granted to him in October, 1838. That at the time he entered upon said administration and made an inventory of the estate, he confidently believed that his intestate's estate would be amply sufficient to satisfy all his creditors. That at November term, 1839, the respondents obtained a judgment against him in the District Court of the United States, for a debt due to them by the intestate. That the complainant, having then discovered that the estate would not be sufficient to pay the debts of the deceased, suggested its insolvency to the Probate Court on *108] the first Monday of December following; whereupon the court adjudged *the estate insolvent, and appointed commissioners to receive and audit the claims. That, to the great wrong of the intestate's other creditors, an execution has been since issued on the judgment of *Benedict & Benedict*, and levied by the marshal on a large portion of the most valuable property of the intestate, thereby preventing the sale of

[1] APPLIED. *Pulliam* v. *Osborne*, 17 How., 475. DISTINGUISHED. *Black* v. *Scott*, 9 Fed. Rep., 190. FOLLOWED. *Peale* v. *Phipps et al.*, 14 How., 375; *Taylor et al.* v. *Carryl*, 20 Id., 596; *Yonley* v. *Lavender*, 21 Wall., 281. REVIEWED. *Burt et al.* v. *Keyes et al.*, 1 Flipp., 67. CITED. *Union Bank of Tennessee* v. *Jolly's Adm'rs*, 18 How., 507; *Hay* v. *Railroad Co.*, 4 Hughes, 352.

[2] EXPLAINED. *Yonley* v. *Lavender*, 21 Wall., 281. CITED. *Green's Adm'r* v. *Creighton et al.*, 23 How., 107.

it by the administrator under the order of the Probate Court. Wherefore he prays the court to grant him a writ of *audita querela*, and to order a writ of *supersedeas* to issue to the marshal, to stay the execution, and for further relief.

On this bill, the judge ordered an injunction to issue. The respondents afterwards appeared and demurred to the bill for want of equity, and afterwards, at June term, 1845, upon hearing, the court decreed that defendants' demurrer to plaintiff's bill of complaint be sustained, and the bill dismissed. At the same term, it was ordered that the final decree be enrolled, and an appeal allowed to this court. A writ of error was also issued.

The 80th section of the statute of Mississippi concerning the estates of decedents (Howard & Hutchinson, 409) provides that "when the estate both real and personal of any person deceased shall be insolvent, or insufficient to pay all the just debts which the deceased owed, the said estate, both real and personal, shall be distributed to and among the creditors, in proportion to the sums to them respectively due and owing; and the executor or administrator shall exhibit to the Orphans' Court an account and statement, &c. And if it appear to the said Orphans' Court that such estate is insolvent, then, after ordering the lands, tenements, &c. of the testator or intestate to be sold, they shall appoint two or more persons to be commissioners, with full power to receive and examine all claims of the several creditors of such estate," &c., &c. And the court are afterwards required to make distribution *pro rata* among the creditors, after paying the funeral expenses, &c.

The 98th section provides, that no execution shall issue on any judgment obtained against any such insolvent estate, but it shall and may be filed as a claim against it, &c.

The case was argued by *Mr. Frederick P. Stanton*, for the appellant, and *Mr. Featherston*, for the appellees.

Mr Stanton said that the equity of this case was dependent upon the peculiar statutes of the state of Mississippi, which require the assets of insolvent estates to be divided among the creditors, in proportion to their respective demands. See Hutchinson's Miss. Code, ch. 49, § 103, p. 667.

This law creates a lien in favor of the creditors from [*109 the time of *the debtor's decease; and a judgment by any creditor, against the administrator or executor, cannot affect the right of the other creditors to their due proportion of the estate. Same Code, p. 673.

The supreme court of the state has given an authoritative exposition of these several provisions, in the case of *Dye's Administrator* v. *Bartlett*, 7 How. (Miss.), 227.

Mr. Featherston, for the appellees.

It is contended for the appellees, Benedict & Benedict, that the court below did not err in sustaining the demurrer to the appellant's bill of injunction. It is rather a matter of surprise that said bill should have been granted by the district judge. Appellant shows, by the allegations and admissions in his bill, that the estate of his intestate was rendered insolvent by his own negligence and maladministration. The largest debt due the estate of said Baldwin, to wit, a note drawn by Henry A. Fowlkes, of Alabama, for seven thousand dollars, was lost to the estate by the refusal of the administrator to sue on it. Other acts of maladministration are apparent on the face of the bill.

Appellant has not, therefore, made out such a case as would entitle him to relief in a court of equity. Administrators are bound to exercise such prudence, diligence, and caution in the administration of estates, as a prudent man, looking to his own interests, would exercise in the management of his own affairs. See *Bailey et al.* v. *Dilworth*, 10 Sm. & M. (Miss.), 404.

They are also required by the statutes of Mississippi, to be prompt in reporting the insolvency of the estates of their intestates. See *Bramlet* v. *Webb et al.*, 11 Sm. & M.(Miss.), 439.

But it is said by the solicitor for the appellant, that "the equity of this case is dependent upon the peculiar statutes of the state of Mississippi, which require the assets of insolvent estates to be divided among the creditors in proportion to their respective demands." See Hutch. Miss. Code, ch. 49, § 103, p. 667.

It is equally true that the statutes of Mississippi give judgment creditors a lien on all the property of defendants from the rendition of the judgment. See Hutch. Miss. Code, 881, 882, 885, 890, 891, 894; *Dye's Administrator* v. *Bartlett*, 7 How. (Miss.), 226.

Benedict & Benedict acquired a lien on all the property of Benjamin J. Baldwin, deceased, in the hands of Thomas Williams, his administrator, from the rendition of their judgment
*110] in November, 1839. This lien could not be defeated by any *act of the defendant Williams. The plaintiffs in the court below could alone by their acts raise their lien. See 1 Bland. (Md.), 449, 452.

Nothing subsequent could divest plaintiffs' lien without their consent. This judgment was rendered before the appellant

declared the estate insolvent. The other creditors, who had not obtained judgments, acquired a lien (if at all) from the time the Court of Probates declared the estate insolvent, and not from the death of the intestate, as insisted by counsel for appellant. See Hutchinson's Code, 673.

The plaintiffs, therefore, in the court below, acquired by their judgment a prior lien on the estate of Baldwin over the other creditors. A prior lien gives a prior right to satisfaction. See *Andrews* v. *Wilkes*, 6 How. (Miss.), 554.

This judgment was entitled to satisfaction, to the exclusion of all other creditors. Nor will it do injustice to other creditors to give it such preference.

The case would not be altered if Baldwin were alive; it would still be a prior lien. It is an advantage gained over other creditors by the superior vigilance of the appellees in the prosecution of their claim to final judgment,—an advantage recognized and sustained by the law.

There is no provision of the statutes of Mississippi which operated *per se* as a stay of execution on this judgment in the court below. Nor is there any, it is believed, which would by any fair or rational construction authorize the district judge in enjoining it.

Section 103 of Hutchinson's Mississippi Code, pages 667, 668, relied on by appellant's counsel, provides that no suit shall be commenced against an administrator after his intestate's estate has been declared insolvent, &c., &c. This section can have no bearing on this case, because the judgment was obtained and the suit ended before the estate was reported or decreed insolvent.

Section 1, art. 2, of the same code, p. 673, is also relied on. This section provides, that, when suits are pending against administrators, and undetermined at the time the estates of their intestates are decreed insolvent, execution shall be stayed after judgment, &c. This provision is equally inapplicable to this case. This suit was determined, and judgment rendered, before appellant reported the estate of Baldwin insolvent.

Would not a decision, bringing this case within the meaning of the above sections, (and they are the only statutes relied on,) be an act of a legislative rather than a judicial character?

The decree of the district judge dismissing the bill of injunction *must therefore be sustained. No injustice will be done to the other creditors. They have their remedy against the administrator and his securities on his official bond, for all acts of maladministration, &c. See *Edmundson* v. *Roberts*, 2 How. (Miss.), 822; *Lerhr* v. *Tarball*, 2 Id., 905; *Prosser* v. *Yerby*, 1 Id., 87. [*111

Mr. Justice GRIER delivered the opinion of the court.

The only question raised in this case depends on the construction of the peculiar statutes of Mississippi. It is, whether a plaintiff who has obtained a judgment against the administrator of an intestate's estate, before it has been declared insolvent, has such a prior lien on the same as will entitle him to issue an execution and satisfy his judgment out of the assets, after the estate has been declared insolvent by the Orphans' or Probate Court, and commissioners appointed for the purpose of distributing the assets equally among all the creditors.

The process, both mesne and final, in the District and Circuit Courts of the United States, being conformed to those of the different states in which they have jurisdiction, the lien of judgments on property within the limits of that jurisdiction depends, also, upon the state law, where Congress has not legislated on the subject.[1] In some of the states, a judgment is not a lien on lands; in others, there is a lien coextensive with the jurisdiction of the court. In Mississippi, a judgment obtained in his lifetime is a lien, from the time of its rendition, on all the defendant's property; and the property of a decedent becomes liable for his debts from the time of his death. (See *Dye* v. *Bartlett*, 7 How. (Miss.), 224.) Consequently, the lien of a judgment obtained before defendant's death cannot be affected by a declaration of insolvency subsequently made by his administrator. But if, at the time of the death, the fund from which each of the creditors has an equal right to claim satisfaction is insufficient to pay all, equity requires that one should not be permitted, by a mere race of diligence, to seize satisfaction of his whole debt, at the expense of another. Hence, a declaration of insolvency must relate back to the death, in order that this equitable principle may have its effect. Such appears to be the policy of the legislation of Mississippi on this subject, apparent in her statutes and the decisions of her courts.

The case of *Parker* v. *Whiting*, 6 How. (Miss.), 852, decided in the High Court of Errors and Appeals of that state, presented the same point in a case parallel with the present.

In that case, as in this, it was contended that an administra-
*112] tor cannot report an estate insolvent after nine months, that *being the period within which he cannot be sued; and that a judgment obtained after that time became a lien on all the property of the deceased, which cannot be destroyed, raised, or superseded by the subsequent report of insolvency,

[1] CITED. *Brown* v. *Pierce*, 7 Wall., 217; *Baker* v. *Morton*, 12 Id., 158.

especially when it appeared that this insolvency might have been caused by the maladministration of the defendant.

But that court decided that the estate of a deceased person may be reported insolvent after the expiration of nine months from the grant of letters of administration; and that, when an estate is so reported, the lien of a judgment previously obtained against the administrator is held in abeyance, and must give way to the general and equal lien of all the creditors which existed at the time of the death, and to which the declaration of insolvency must relate. Also, that the action of the Probate Court on a report of insolvency cannot be collaterally impeached; and if the insolvency has been caused by maladministration, the remedy is by action for a devastavit, or on the administration bond.

In this exposition of the statutes of Mississippi, as given by her courts, we fully concur; and it is conclusive of the question now under consideration.

As, therefore, the judgment obtained by the plaintiffs in the court below did not entitle them to a prior lien, or a right of satisfaction in preference to the other creditors of the insolvent estate, they have no right to take in execution the property of the deceased which the Probate Court has ordered to be sold for the purpose of an equal distribution among all the creditors. The jurisdiction of that court has attached to the assets; they are *in gremio legis*. And if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction. But we wish it to be understood, that we do not intend to express any opinion as to the right of state legislation to compel foreign creditors, in *all* cases, to seek their remedy against the estates of decedents in the state courts alone, to the exclusion of the jurisdiction of the courts of the United States. That will present an entirely different question from the present.

The decree of the court below dismissing the bill must be reversed, and a decree entered in favor of complainant continuing the injunction.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States [*118
for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, reversed, with

costs, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to enter a decree in favor of the complainant, continuing the injunction in this cause, and for such further proceedings, in conformity to the opinion of this court, as to law and justice may appertain.

THE UNITED STATES, APPELLANTS, *v.* THE HEIRS OF BOISDORÉ.

SAME, APPELLANTS, *v.* THE HEIRS OF POWERS.

SAME, APPELLANTS, *v.* THE HEIRS OF TURNER.

In 1824, Congress passed an act (4 Stat. at L., 52), entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims."
The second section provided that, in "all cases, the party against whom the judgment or decree of the said District Court may be finally given, shall be entitled to an appeal, within one year from the time of its rendition, to the Supreme Court of the United States"; and the fifth section enacted that any claim which shall not be brought by petition before the said courts within two years from the passing of the act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred.
In 1844, Congress passed another act (5 Stat. at L., 676), entitled "An act to provide for the adjustment of land claims within the States of Missouri, Arkansas, and Louisiana, and in those parts of the States of Mississippi and Alabama, south of the thirty-first degree of north latitude, and between the Mississippi and Perdido Rivers."
It enacted, "that so much of the expired act of 1824 as related to the State of Missouri be, and is hereby, revived and reënacted, and continued in force for the term of five years, and no longer; and the provisions of that part of the aforesaid act hereby revived and reënacted shall be, and hereby are, extended to the States of Louisiana and Arkansas, and to so much of the States of Mississippi and Alabama as is included in the district of country south of the thirty-first degree of north latitude, and between the Mississippi and Perdido Rivers."
The act of 1824, revived and reënacted by the act of 1844, did not expire in five years from the passage of the act of 1844, so far as regards appeals from the District Court to this court. It will continue in force until all the appeals regularly brought up from the District Courts shall be finally disposed of.[1]

THE first two of these cases were appeals from the District Court of Mississippi. One of them, viz., *The United States* v. *The Heirs of Boisdoré*, was the same case in which a motion

[1] CITED. *United States* v. *Porche*, 12 How., 482.

to dismiss was made at the preceding term, as reported in 7 Howard, 658.

*The third was an appeal from the District Court of [*114 Louisiana.

A motion was now made to dismiss the whole three, upon a ground which was common to them all, viz., that the act of 1844, reviving and reënacting the act of 1824, continued it in force for the term of five years, and no longer; and that, as the act was passed on the 17th of June, 1844, it expired upon the 17th of June, 1849. By reason of which expiration, it was alleged, this court had no longer any jurisdiction over the case.

By an act of June 17th, 1844, (5 Stat. at L., 676,) entitled "An act to provide for the adjustment of land claims within the states of Missouri, Arkansas, and Louisiana, and in those parts of the states of Mississippi and Alabama south of the thirty-first degree of north latitude, and between the Mississippi and Perdido Rivers," it is enacted, "That so much of the expired act of the 26th of May, 1824, entitled 'An act to enable claimants to land within the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims,' as related to the state of Missouri, * * * be and is hereby revived and reënacted, and continued in force for the term of five years, and no longer; and the provisions of that part of the aforesaid act, hereby revived and reënacted, shall be and hereby are extended," to the states of Louisiana, Mississippi, &c., "in the same way, and with the same rights, powers, and jurisdictions, to every extent they can be rendered applicable, as if these states had been enumerated in the original act hereby revived, and the enactments expressly applied to them, as to the state of Missouri; and the District Court and the judges thereof, in each of these states, shall have and exercise the like jurisdiction over the land claims in their respective states and districts, originating with either the Spanish, French, or British authorities, as by said act was given to the court and the judge thereof in the state of Missouri."

The act of the 26th of May, 1824, thus revived and reënacted, (4 Stat. at L., 52,) after describing the classes of cases embraced within its provisions, prescribes, that the claimants shall present a petition to the District Court, setting forth their claims; that proper parties, including the district attorney, shall be made; that the proceedings shall be conducted according to the rules of a court of equity; and that the said court shall have power to hear and determine the questions arising in the cause, and to make a decree. It then, in the

latter part of the second section, enacts:—"And in all cases, the party against whom the judgment or decree of the said
*115] District Court may be finally given shall be entitled to an appeal, within one *year from the time of its rendition, to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the parties; and should no appeal be taken, the judgment or decree of the said District Court shall, in like manner, be final and conclusive."

By the fifth section it is enacted "that any claim to lands, tenements, or hereditaments, within the purview of this act, which shall not be brought by petition before the said courts within *two* years from the passing of this act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within *three* years, shall be forever barred, both at law and in equity; and no other action at common law, or proceeding in equity, shall ever thereafter be sustained, in any court whatever, in relation to said claims."

In the three cases above mentioned, petitions had been filed in the respective courts, and the district judge confirmed the claims to the several petitioners. The United States appealed to this court.

The motion to dismiss was sustained by *Mr. Volney Howard* and *Mr. Henderson*, and opposed by *Mr. Gillet* and *Mr. Johnson* (Attorney-General).

The motion and brief, as filed by *Mr. Henderson*, were as follows:

The appellees have presented their respective motions to dismiss these cases, in form, as follows:—

"And now at this term come the appellees, by attorney, and move the court to dismiss this case, because the court has no jurisdiction thereof, in this, to wit:—That the court from which this case is brought here by appeal had but a limited and special jurisdiction of the case in virtue of two acts of Congress, the one of date 17th June, 1844, entitled 'An act to provide for the adjustment of land claims within the states of Missouri, Arkansas, Louisiana, and those parts of the states of Mississippi and Alabama south of the 31st degree of north latitude, and between the Mississippi and Perdido rivers,' and which said act revived a certain other expired act therein recited of date 26th May, 1824, for five years and no longer, and during the operative existence of which two acts, the decree in this case was pronounced. And because by

virtue of which said act of 1824, so revived as aforesaid, and by no other law or authority whatever, this court was assigned to have a like special jurisdiction of this case by appeal; but which act, so revived as aforesaid, ceased and expired on the 17th of June, *1849, by express legislative limitation, [*116 without any saving clause for the adjudication of cases then pending."

Assuming the facts to be as set forth in this motion, we contend that there is now no law in force giving to this court jurisdiction of these cases, or of supplying any rule by which it can review them; and the same must therefore be dismissed.

It is well settled, that this court has no general jurisdiction in matters of appeal. That unless Congress authorize an appeal by statute, none can be entertained. 11 Pet., 165, 166; 3 How., 104; 6 Pet., 495; 1 Cranch, 212; 3 Id., 159; 6 Id., 307; 3 Dall., 321, 327; 1 How., 268; 3 Id., 317; 7 Wheat., 38; 3 Pet., 193; 7 Id., 568.

It is equally well settled, that the United States have no greater claim to assert the right of appeal, or any other legal right as a litigant, than a citizen has; and have no right of appeal unless expressly accorded to them by act of Congress. 6 Pet., 494; 11 Id., 165, 166.

If, therefore, it be shown that the appeal given by the statute of 1824 was special, and had its origin with that statute, and that the statute conferred a special and peculiar jurisdiction, appellate as well as original, and that said statute has expired or is repealed, we suppose the legal conclusion of such showing to be demonstrative in favor of our motion to dismiss, unless some other law be shown to sustain the appeal.

A mere glance at the records and decrees in these cases, show them to have been adjudicated in pursuance of the authority conferred by these two statutes. And the reading of the statute of 1824 will certify the speciality of the jurisdiction it confers in every section.

It is special as to the states to which it applies, being but five in number. Special as to the classes of cases it submits for trial; and even excepts one case of the classes submitted.

It is special in designating the court to have cognizance of the cases, and directing the mode of procedure. Selecting the District Courts of the United States, which have no general chancery jurisdiction, and directing them to adjudicate the cases in accordance with equity practice.

It is peculiarly special, also, in enlarging the field of equity power in the latitude given for the decision of these cases. Submitting them to be adjudged in "conformity with the principles of justice," and "according to the law of nations

the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto; the laws and ordinances of the government from which it (the title) is alleged to have been derived; and all other questions properly arising between the claimant and the United States."

*117] *It is strikingly special in permitting the citizen to implead and litigate with the government.

The rules of evidence are special; the common law rules being relaxed in these cases.

The statute submitted, also, legal and complete titles to be tried under equitable rules.

The decree to be pronounced was special in its recitals and requirements.

The powers of the court were peculiarly special, also, in being permitted to decree the survey of the claims adjudged, though affecting the public domain.

And the operation and effect of the decree are also singularly special, when, after adjudging the title of the petitioner in his favor, it deprived him of so much of the claim as the United States had previously disposed of, and turned him over for reclamation upon the public lands: the decree, to this extent, thus operating as land scrip.

The time allowed for an appeal from decrees pronounced under this statute is special, being limited to one year.

Such are a portion of the peculiar and special rules under which proceedings in these cases have been carried on, and the decrees pronounced, pursuant to the act of 26th May, 1824, and while it was in force. And such only must be the rules by which this court can review and revise these cases, if it assumes to review them at all. It must be certainly requisite, then, if this court is to review these cases by these rules (being the rules by which the court below adjudged them), the rules themselves must have vitality, and be in force. Because, from no other laws and from no other source of authority, can these rules be invoked, but from the act of 1824. But this act, by the special limitation of the act of 1844, which revived it, was prescribed in the precise measure and duration of its operative existence; and the act again became *functus* on the 17th of June, 1849.

This act, therefore, which conferred specially all the jurisdiction this court could ever entertain of these cases, is now as if it had never been, except as to the rights it conferred, consummated, or established, while in force.

This court, then, can have no right to retain these cases upon its docket, because it has no rule, law, or authority in existence by which it can try and adjudge them. In other

words, the jurisdiction by which it was contemplated this court should have cognizance of these cases was wholly special, and the law which conferred it is extinct, and has ceased to be a rule. And this conclusion we think clearly sustained by the following authorities. *Miller's case, [*118 8 Burr., 1456; 1 Hill (N. Y.), 328–336; 2 Pet., 523, 524; 5 Mart. (La.), 462; 4 Wend. (N. Y.), 211; 6 Id., 526; 1 Watts (Pa.), 258; 4 Yeates (Pa.), 392; 17 La. 478; Dwarris on Statutes, 676; 4 Mann. & R., 586–588; 9 Barn. & C., 750· 12 Moo., 357–359; 4 Moo. & P., 341, 351; 4 Bing., 212.

We consider the court has already construed this statute of 1824 as conferring a special jurisdiction, as well as special remedy. (*United States* v. *Curry*, 6 How., 113. And see 6 Pet., 493, and 11 Id., 165, 166.)

Congress, too, in extending this act of 1824, by the act of 24th May, 1828 (4 Stat. at L., 298), obviously discovers its opinion, that, with the expiration of the law, the jurisdiction also terminated.

And so, too, in repealing the bankrupt laws of 1800 and of 1841. In both instances, Congress inserted a saving clause, to save jurisdiction in cases pending at the time of the repeal; and without which, doubtless, those cases would have fallen with the repeal.

Mr. Gillet said it was not his purpose to controvert the correctness of the positions laid down in the cases cited for the motion. If there was no statute in force conferring jurisdiction upon the Supreme Court, he should not contend that these appeals could be heard. Nor should he insist that the Judiciary Act conferred any such power. It was found in the act of 1824, or did not exist at all. It has been contended, that this act expired in five years from its approval, and was revived June 17, 1844, for five years only, and is not now in force. He denied the correctness of this assumption, and took issue upon it. The second and fifth sections of the act of 1824 contain limitations upon the claimant, as to the time within which the petition shall be presented, and the cause heard and an appeal taken. The residue of the act is without limitation. As a whole, it is as permanent as any other statute. An examination of its provisions, and especially sections 2, 3, 5, 6, 7, and 11, will prove this. The fifth section contains an important limitation, while the seventh contains an important provision applicable to all bonds not determined to belong to claimants. There is no limitation upon the jurisdiction of this court, when a cause is lawfully brought here. The act of 1844 revived and continued in

operation provisions relating to proceedings in the court below only.

But if we are in error in this view of the statute, then these *119] appeals, having removed the causes from the court below, cannot *be sent back to that court. If there is no law empowering this court to hear and determine them, then it has no power to act upon them at all, and it can perform no act which will entitle either party to any advantage which they did not possess, and could not enforce, on the day when the revival act of 1844 expired. To dismiss the appeal, and thereby furnish evidence that the causes had not been lawfully brought here under the act, would lay the foundation for the claimants to contend that it was never properly made, and that they were therefore entitled to patents under the decision of the district judge.

Mr. Johnson (Attorney-General) said, that, if the construction given to these laws upon the other side was correct, the result would be that they could stand upon the decree below as a final decree. But all these land laws did not contemplate that the decree of the court below was to be final, in case either party chose to appeal; and we had obtained an appeal when it was properly taken even upon the showing of the other side, and when this court had undoubted jurisdiction over the case. Let us look into the act of 1824, and then examine what part of it was revived. The dispute is, whether the jurisdiction of this court, when once attached, stopped when five years expired after the passage of the act of 1844. If we had now a case before us arising under the act of 1824 alone, without any other act having been passed, this court could decide it and settle the controversy, provided the appeal had been taken in proper time.

(*Mr. Henderson* said he conceded that.)

Then if the opposite counsel concedes that, I think that the other consequences for which I contend must follow. What was the character of the act of 1824? It describes the claims which are to be presented, the notice to be given, the proceedings to be had, the principles by which the decision is to be governed, and states the reasons for granting an appeal to this court. The claimant had a year to decide whether he would appeal or not. The District Attorney was directed to consult the Attorney-General whether or not an appeal should be taken in case the decision was adverse to the United States. If no appeal was taken, the decree below was final. If the claimant succeeded, a copy of the decree was to be presented to the land office, and he would receive his patent. If he

succeeded by the judgment of this court, he was to present the certificate of the clerk of this court to the land office, before he could receive a patent. But how was this to be done, if the jurisdiction of this court was to cease after the expiration of five years *from the passage of the act of 1844? It is admitted that, under the act of 1824, the jurisdiction of this court would not have ceased. Therefore, the opposite counsel must contend that the two acts are not alike; and yet the act of 1844 extends the act of 1824 "in the same way, and with the same rights, powers, and jurisdictions to every extent they can be rendered applicable." Suppose a party were to put off the trial of his cause in the court below until a late period, or the court was so pressed with business that the case could not be taken up, or that the District Attorney could not immediately report to the Attorney-General, a decree might be passed for millions which would be irrevocably lost to the government; and yet it is admitted that this would not have been so under the act of 1824. These laws have always looked to a supervision, by this court, of the decree of the District Court; and if the opposite counsel are right, this act of 1844 is an exception to all the laws, and Congress have committed a palpable blunder. [*120

But reliance is placed by the opposite counsel upon the phraseology of the act of 1844, namely, that the act of 1824 is continued in force for the term of five years and *no longer*. What has this court said about the same expression in another law? The act of 24th May, 1828, (4 Stat. at L., 298,) was to continue in force until the 26th of May, 1830, and *no longer;* and yet cases were decided here long after that day. This very question was involved and decided in those cases. If the court had no jurisdiction and the appellate power had expired, all these judgments are void. The titles will be lost to thousands of acres, which are now held under these judgments.

Mr. Chief Justice TANEY delivered the opinion of the court.

A motion has been made to dismiss this case, for want of jurisdiction in this court to hear and decide it.

It appears that a petition was filed by the appellees in the District Court of the United States for the Southern District of Mississippi, pursuant to the acts of Congress of May 26, 1824, and of June 17, 1844, praying to have confirmed to them a large tract of land, which they claimed under a concession or grant which they alleged had been made to their ancestors by the Spanish authorities.

The petition was filed on February 1, 1845, and on the 12th of November, 1847, the district judge passed his decree confirming the concession; and on the same day the United States appealed to this court. The motion is made to dismiss, *121] upon the ground that the act of 1844, which extended to the state of Mississippi the act of 1824, and reënacted it as to claims in that state, limited the duration of both acts to five years and no longer, and that both of these acts, so far as concerns such claims, expired on the 17th of June, 1849; and this court having no appellate jurisdiction, unless conferred on it by act of Congress, and having derived the jurisdiction it heretofore exercised in cases of this description altogether from the laws above mentioned, its power in this respect ceased when the laws expired; and there being no act of Congress now in force authorizing it to review the decree of the District Court for the Southern District of Mississippi, the appeal of the United States ought to be dismissed for want of jurisdiction.

It is true that this court can exercise no appellate power over this case, unless it is conferred upon it by act of Congress. And if the laws which gave it jurisdiction in such cases have expired, so far as regards claims in the state of Mississippi, its jurisdiction over them has ceased, although this appeal was actually pending in this court when they expired.[1]

But the court is of opinion that the act of 1824, reënacted by the act of 1844 for the state of Mississippi and the other states mentioned in that law, has not expired so far as regards appeals from the District Courts to this court; that it is still in full force, and unless repealed by Congress will continue in force, until all the appeals regularly brought up from the District Courts shall be finally disposed of.

The act of 1824 originally extended only to the Spanish and French grants in the state of Missouri, and the then territory of Arkansas. It contains no clause limiting generally the duration of the law. The fifth section limits the time within which the claimants may file their petitions to two years, and gives the petitioner three years from the time his petition is brought before the District Court, to prosecute it to a final decision in that court; but by the second section either party may appeal to this court, within twelve months from the time of the final decree in the District Court. And as many of the cases might and most probably would be decided in the latter

[1] FOLLOWED. *McNulty* v. *Batty et al.*, 10 How., 79. CITED. *Railroad Co.* v. *Grant*, 8 Otto, 401.

period of the five years within which the party is required to present his claim and prosecute it to a final decision, it is evident that the jurisdiction of this court to hear and determine the appeal was not intended to be limited to the same period. And as there is no clause of limitation applying to the whole act, nor as to the time within which this court shall exercise the appellate power conferred on it, the act of 1824, in this respect, is a perpetual one; and if any appeal were at this day depending, which had *been regularly brought up from the state of Missouri or the territory of Arkansas, the court would have jurisdiction to hear and decide it. [*122

This construction of the original act of 1824 is, indeed, not disputed. But it is insisted that it is otherwise when taken in connection with the act of 1844, which reënacted it for the states therein mentioned, in one of which this case has arisen. And it is contended that the duration of the whole act of 1824, as thus reënacted, including the appellate jurisdiction of this court, is restricted to five years from the enactment of the law.

This construction cannot be maintained. In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy. And it was evidently the intention of the act of 1844 to place the claims under Spanish and French grants in the states therein mentioned upon precisely the same footing with the claims in Missouri and the territory of Arkansas, and to give the claimants the same rights and remedies, including the right to appeal to this court. For it declares in express terms, that the act of 1824 shall be extended to them, "in the same way, and with the same rights, and powers, and jurisdictions to every extent they can be rendered applicable, as if these states had been enumerated in the original act thereby revived; and the enactments expressly applied to them, as to the state of Missouri." Now, if they had been included in the original act, and the enactments applied to them as to the state of Missouri, it is admitted that the appellate jurisdiction of this court would not be limited to five years. And if it would not, it necessarily follows that it is not limited by the act when reënacted and extended by the law of 1844. For if it were to be so limited, and the jurisdiction of this court ceased in five years, the rights and powers and jurisdictions in relation to the claimants in these states would be different from what they would have been if they had been included in the original law. Such a construction would in effect take away the jurisdiction of this court, and deprive each party of the right to appeal

within twelve months in the cases decided in the last year of the five, and would make the appeal in almost every case inefficient and nugatory. Certainly, there could be no reason of policy or justice for making such a difference in the jurisdiction of this court in different classes of similar cases; nor could such have been intended. The error of the appellees appears to have arisen from what is evidently an inaccuracy of language in the act of 1844, when it speaks, in the beginning of the enacting clause, of "so much of the expired act *123] *of 1824" as related to the state of Missouri. Now the act of 1824, as we have already said, had not expired, and is still in force. But the fifth section of the act, which gave the claimant two years from the date of the law to file his petition, and three more to bring it to a final decision, had expired. And the whole context and provisions of the act of 1844 show that it was the intention of the legislature to revive this portion of the act of 1824, and to give to the claimants in the states there mentioned, as it had given to those in the state of Missouri, five years to establish their claims, and to subject them in other respects also to the same regulations and jurisdictions in prosecuting them in the courts of the United States. And the expression, "so much of the expired act of 1824," should have been, "so much of the act of 1824 as had then expired," in order to make this clause consistent with the residue of the act. This evident inaccuracy ought not, however, to embarrass the court in expounding the act, which, taken altogether, is sufficiently plain in its objects and intention, as well as in its language.

The motion to dismiss this appeal must therefore be overruled.

The cases of *The United States* v. *The Heirs of Powers*, and *The United States* v. *The Heirs of Turner*, stand upon the same grounds, and the motions to dismiss them must therefore be disposed of in like manner.

Order.

On consideration of the motion made by Mr. Henderson, of counsel for the appellees, on a prior day of the present term of this court, to wit, on Friday the 14th instant, to dismiss this cause for the want of jurisdiction, and of the arguments of counsel thereupon had, as well against as in support of the said motion, it is now here ordered by this court, that the said motion be, and the same is hereby, overruled.

*JOHN H. BENNETT, PLAINTIFF IN ERROR, v. SAMUEL F. BUTTERWORTH.

Where a plaintiff in the court below filed a petition for the recovery from the defendant of four slaves, whose value he alleged to be $2,700, and the jury found a verdict for the plaintiff "for $1,200, the value of the negro slaves in suit," and the plaintiff thereupon released the judgment for $1,200, and the court adjudged that he recover of the said defendant the said slaves, the case is within the appellate jurisdiction of this court.

The plaintiff averred in his petition, that the slaves were worth $2,700, and by his releasing the judgment for $1,200, the only question before this court is the right to the property. And as the defendant below prosecuted the appeal, the plaintiff cannot be allowed to deny here the truth of his own averment of the value of the property in dispute.[1]

THIS case was brought up, by writ of error, from the District Court of the United States for the District of Texas. The facts are stated in the opinion of the court.

A motion was made to dismiss it for want of jurisdiction, because the sum or matter in controversy was not of the value of two thousand dollars.

The motion to dismiss was sustained by *Mr. Hughes* and *Mr. Howard*, and opposed by *Mr. Harris*.

The reasons in support of the motion were the following:

The counsel for Butterworth move to dismiss the writ of error, because the sum or matter in controversy is not of the value of two thousand dollars. Bennett's counsel, on this motion, have taken affidavits to show the negroes to be worth two thousand dollars and upwards.

We contend, for the defendant in error, that the affidavits cannot be read:—

1. Because they contradict the verdict of the jury, which is a part of the record. The error complained of is, that the court erred in giving judgment for the negroes, instead of for the value assessed by the jury; while, on the other side, it is insisted that the judgment was right, and properly for the negroes. The matter then in controversy is the negroes and their value. If the court should be of the opinion, that judgment in the court below could only have been rendered for the value assessed, then the judgment will be reversed, and judgment rendered on the verdict below for that value; and there-

[1] CITED. *Stinson* v. *Dousman*, 20 How., 467. For further decisions in the same litigation, see 11 How., 669; 12 Id., 367.

by the plaintiff in error, by proving by affidavits what is insisted upon to be the true value, will get off with paying the twelve hundred dollars, though, by his own showing, the value is more than two thousand dollars. Such a result as this will *125] certainly not be tolerated. Could the matter be so arranged that, in the *event the judgment is reversed, a judgment could be rendered for the true value, it might be otherwise; for then in truth the matter in controversy in the Supreme Court would be of the value of two thousand dollars; but, as it stands, the plaintiff may be enabled to get clear of a delivery of the negroes, but in no event can be compelled to pay what he says is the true value.

2. Because the judgment in the court below was for the plaintiff; and that judgment it is which, by the writ of error, is in controversy in the Supreme Court; and upon an affirmance of the judgment below, if the affirmed judgment would be for the value of $2,000 or more, then the court would have jurisdiction; but in the case, in any event, there cannot be a judgment for more than twelve hundred dollars, or for the negroes, which the record proves to be of the value of $1,200, and the court cannot take jurisdiction. *Gordon* v. *Ogden*, 3 Pet., 33; *Smith* v. *Honey*, Id., 469; *Knapp* v. *Banks*, 2 How., 73.

3. Mr. Justice Story says,—"To support the jurisdiction, it is necessary that it appear upon the face of the record, or upon affidavits to be filed by the parties, that the sum or value in controversy exceeds $2,000, exclusive of costs." *Hagan* v. *Foison*, 10 Pet., 160.

When the value appears upon the face of the record, that record must be the only evidence; but when it is silent, evidence *aliunde* may be looked to. When the plaintiff in his declaration or petition claims more than two thousand dollars, and the judgment is for the defendant below, the court has jurisdiction; because, as the court say in *Gordon* v. *Ogden*, the whole sum claimed "may be still recovered; and, consequently, the whole sum claimed is still in dispute." But the same court say, in the same case, "If the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the Circuit Court; and consequently, the matter in dispute cannot exceed the amount of the judgment."

From these rules it would seem that the record, when containing on its face evidence of the value, is conclusive.

The rule as to affidavits was adopted of necessity, and applies only in cases where the record does not furnish evidence of the value. This is shown by the case in which the

rule was first laid down. See *Williamson* v. *Kincaid*, 4 Dall., 20.

Mr. Harris against the motion.

The counsel for the defendant in error have moved to dismiss the writ of error, because the sum or matter in controversy *is not of the value of two thousand [*126 dollars. But the same counsel admits in court, that, when the judgment was rendered, the slaves in controversy were worth more than said sum.

He contends, however, that affidavits to that effect cannot be read:—

1. Because they would contradict the verdict of the jury.

2. Because the judgment of the court below was for the plaintiff for property which the record proves to be only of the value of twelve hundred dollars.

And, in support of these positions, he cites the cases of *Gordon* v. *Ogden*, 3 Pet., 33; *Smith* v. *Honey*, Id., 460; *Knapp* v. *Banks*, 2 How., 73; *Hagan* v. *Foison*, 10 Pet., 160; and *Williamson* v. *Kincaid*, 4 Dall., 20.

Now, for the plaintiff in error it is contended, that these authorities do not sustain the position taken in the brief of the counsel for the defendant in error. In the first three cases, it was impossible to prove that the sum in controversy amounted to more than two thousand dollars, for judgments were rendered for money; in the first instance, for the sum of four hundred dollars; in the second, for only one hundred dollars; and in the third, for $1,720. In the fourth and fifth cases, the amount did not appear upon the face of the record, and the court held that the plaintiffs in error might prove by affidavits that the value of the property in controversy, in these respective causes, amounted to more than the sum of $2,000. And it may be remarked, that, in the three cases cited first above, the only question was whether the sum claimed in the count, or that which was recovered, ought to be regarded as the amount in controversy; and to which sum the court should look in order to determine the question of jurisdiction. And the *onus* of proving that the value of the property amounted to more than two thousand dollars rested upon the plaintiff, (who had alleged that its value was $2,700,) and not upon the defendant in the court below. Now, for the first time, the burden of making that proof rests upon the defendant in that court, and he is prepared to make it.

It is respectfully suggested, that there can be produced no decision of this court refusing to permit the plaintiff in error to make such proof. And to deny the privilege, under the

imposing circumstances of this case, would, we contend, be to deny to the plaintiff and the defendant a mutuality of rights under the statute, the benefits of which we are seeking to obtain.

*127] The case of *The United States* v. *The Brig Union*, 4 Cranch, *216, bears a resemblance to this, and in that the court permitted affidavits to be read to prove the value of the property in controversy; see, also, *Wilson* v. *Daniel*, 3 Dall., 401.

It is further contended, that the effect claimed for this verdict ought not to be conceded to it, for that it is illegal, and that it ought to have been set aside in the court below. It will be seen, by reference to the plaintiff's petition,—particularly to the prayer thereof,—that this suit was brought for the recovery of the slaves "*in specie*," (not for the recovery of their value,) and for damages for their unlawful detention. The important issue, viz., whether the right of property was in the plaintiff or the defendant, was, in the verdict of the jury, entirely omitted. See *Coffin* v. *Jones*, 11 Pick. (Mass.), 45.

2. It did not embrace all the issues which it should have done. See *Crouch* v. *Martin*, 3 Blackf. (Ind.), 256; *Patterson* v. *United States*, 2 Wheat., 221; *Jewett* v. *Davis*, 6 N. H., 518.

3. It should have found the value of each of the slaves separately.

II. We further contend, that the judgment is illegal, because it is not responsive to the verdict.

And it is contended, on the part of the plaintiff in error, that he ought not to be estopped from proving the value of the property in controversy by a verdict which is illegal, and is not responsive to the issues; nor by a judgment which is entirely foreign to the verdict. Estoppels are not favored in law, because they tend to exclude the truth. That such would be the case here cannot be questioned. Again, estoppels, like contracts, must bind both parties, or they will bind neither.

Each court is the guardian of its own jurisdiction. *Kendrick* v. *McQuary*, Cooke (Tenn.), 480. And this proposition may be said to be universally correct in regard to appellate courts, established for the purpose of reëxamining causes tried in inferior tribunals, and to correct the errors which may be there committed.

Mr. Chief Justice TANEY delivered the opinion of the court.

The court have considered the motion made in this case to dismiss the writ of error for want of jurisdiction. From the

mode of judicial proceeding adopted in Texas, the motion presents a new question, and one that is not free from difficulty.

The suit is not brought in any of the forms of action known to the common law. It is instituted by petition; and the plaintiff in the court below seeks to recover four slaves, which he alleges are his property, and are detained from him by the defendant. *The value of each slave is averred [*128 separately in the petition, the whole amounting to two thousand seven hundred dollars. The verdict of the jury is as follows:—

"We the jury find for the plaintiff twelve hundred dollars, the value of the negro slaves in suit, with six and a quarter cents damages."

And the record states, that thereupon the plaintiff released the judgment for twelve hundred dollars in open court; and the court adjudged that he recover of the defendant the said slaves and the damages assessed by the jury, and his costs.

This proceeding appears to be a substitute for the common law action of detinue, and resembles it in many respects. In that action, if the jury find that the property belongs to the plaintiff, and is detained from him by the defendant, they ought to find at the same time the value of each separate article in dispute, and the judgment of the court is that the plaintiff recover the property, or the value thereof as found by the jury, provided he cannot obtain possession of the property, together with his damages and costs. Upon such a judgment a writ of error certainly would not lie, when the value assessed by the jury was less than two thousand dollars. For the value of the property in dispute would be fixed by the verdict and the judgment of the court, and both parties would be bound by it.

But in the case before us, the finding of the jury and the judgment of the court differ from the proceedings in an action of detinue. The gross value of the four slaves is found by the jury, and not the separate value of each of them. And the value as found forms no part of the judgment of the court. The plaintiff was permitted to release it,—and although it is said in the record that he released the *judgment* for this sum, yet it appears that no judgment was rendered for it, and that it was released before any was given.

The judgment of the District Court therefore decides nothing more than the right to the property specified in the petition; and whether that judgment is erroneous or not is all that this court can examine into upon the writ of error. The sum which the plaintiff below (who is the defendant in error here) is entitled to recover, if the property is placed beyond

his reach and he fails to obtain possession of it, can form no part of the judgment of this court. The only matter in controversy is the four slaves; and their actual value, whatever it may be, is the value of the matter in dispute.

Now if the judgment of the District Court had been for the defendant, the plaintiff would evidently have been entitled to maintain a writ of error. And as he sues for the specific property, *and avers the value to be $2,700, he would have been entitled to the writ, even if he had laid his damages for the detention below $2,000. For the averment of value when he sues for property shows the value of the thing in controversy, as much as the averment of debt or damage, when he sues for money. And when he has rejected the value found by the jury, and refused a judgment for it, and is not bound by that finding, can he bind the defendant to it, and thereby deprive him of his writ of error, upon the ground that the property in dispute is not worth $2,000?

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This is the question upon the motion before us.

In cases where the plaintiff sues for money, and claims in his pleadings a larger sum than $2,000, and obtains a judgment for a smaller amount, the sum for which the judgment is rendered is the only matter in controversy, when the defendant brings the writ of error. Because, if the plaintiff rests satisfied with it, and takes no step to reverse it, he is bound by it as well as the defendant. Both parties, therefore, stand upon an equal footing in that respect. But if the plaintiff brings the writ of error upon the ground that he is entitled to more than the judgment was rendered for, then his averment in his declaration shows the amount he claimed; and as that claim is the matter for which he brings suit, he is entitled to the writ of error if that claim appears to be large enough to give jurisdiction to this court. These principles have been settled in this court by the cases referred to in the argument.

In the case before us, the plaintiff avers in his petition that the slaves for which the suit is brought are worth $2,700. The right to these slaves must be the only matter in controversy here, whether the writ of error is sued out by the plaintiff or the defendant. If by the plaintiff, he would undoubtedly be entitled to it, upon the ground that the property in dispute, and which he is seeking to recover in this suit, is claimed to be worth more than $2,000; and he would be entitled, under the decisions of this court, to rely on the averment in his petition, to show that the amount in value of the slaves he claimed is sufficient to give jurisdiction to this court. Can he, then, be permitted to deny here the truth of his own averment, when precisely the same thing—

the same property—is the matter in controversy upon the writ of error brought by the defendant? We think not. And as by his release he prevented a judgment from being entered, fixing the value, as between these parties in this suit, at $1,200, the averment in his petition must be regarded as determining the amount in controversy upon a writ of error brought by either plaintiff or defendant. *Consequently, this court has jurisdiction upon this writ, [*130 and the motion to dismiss it must be overruled.

Mr. Justice DANIEL.

In the opinion of the court pronounced in this cause I am unable to concur, regarding that opinion as reconcilable with neither the act of Congress (Judiciary Act, § 22) regulating the jurisdiction of this court, nor with the fundamental rules of pleading and evidence, but as in contravention of both. This cause is in effect, and in form except with regard to the frame of the petition, corresponding with the declaration at common law, in all its details and proceedings, an action of detinue for the recovery of four slaves. In every such action, the authorities tell us that it is requisite to describe the property demanded with so much certainty, that it may be delivered up *in specie;* and it was ruled by the older cases, that, where the property consisted of several articles, the plaintiff must show the value of each particular article, and not state the aggregate value. Subsequently, however, it has been ruled that the declaration may mention the separate value of each article, or it may state the value in gross; and this appears to be the established doctrine in England at this day. See Com. Dig., tit. *Pleader* (2 X 2). So in 1 Chit. Pl., p. 377, it is said, that, "in actions for injuring or taking away goods or chattels, it is in general necessary that their quality, quantity, or number, and value or price, should be stated; the assigned reason is, that a former recovery could not else be pleaded in bar to a second action for the same goods; neither could the defendant properly defend himself." Then with respect to the verdict and judgment, to be rendered in the action of detinue, the law is thus given in Com. Dig., tit. *Pleader* (2 X 12):—"The judgment against the defendant shall be for the recovery of the thing detained *vel valorem inde* and costs; and if judgment be upon confession *non sum informatus*, demurrer, &c., a writ of inquiry shall be awarded to inquire of the values. And after judgment, if a *distringas* goes *ad deliberandum bona*, and the defendant does not, the plaintiff shall have damages taxed by the inquest, so that it lies in the defendant's election to deliver the goods or the value."

Sir William Blackstone in treating of the action of detinue, Vol. IV., p. 413, thus states the law:—"In detinue, after judgment, the plaintiff shall have a *distringas* to compel the defendant to deliver the goods by repeated distresses of his chattels; and if the defendant still continues obstinate, then (if judgment hath been by default or demurrer) the sheriff *131] shall summon an inquest to ascertain the value of the goods, and the plaintiff's *damages (which being so assessed, or by the verdict in case of an issue) shall be levied on the person or goods of the defendant. So that after all, in replevin and detinue (the only actions for recovering the specific possession of personal chattels), if the wrong-doer be very perverse, he cannot be compelled to a restitution of the thing taken or detained." So, too, in Chit Pl., Vol I., p. 124, it is said,—"The nature of this action requires, that the verdict and judgment be such that a specific remedy may be had for the recovery of the goods detained, or a satisfaction in value, for each parcel, in case they or either of them cannot be obtained. The judgment is on the alternative, that the plaintiff do recover the goods or the value thereof, if he cannot have the goods themselves."

The citation of these seemingly trite and familiar principles of law will not be deemed useless, when an application of them, and of the reasons on which they are founded, shall be made to the case under consideration. In the authorities above quoted, we have disclosed to us the propriety and necessity (resulting from the peculiar character of the remedy) for averring in the declaration, and of ascertaining by the verdict and judgment, the value of the property sought; because that value is to become the measure of redress to the plaintiff, in one branch of the alternative, in the event that the other shall prove fruitless. It is indispensable, therefore, that this measure be ascertained upon legal testimony and solemn investigation before the court, and under its supervising authority,—as indispensable, fully, as that the title to the property should be so ascertained; for both enter alike into the redress of the plaintiff, and flow from the same source. His right to the one rests upon the same foundation with his right to the other, and if he had no right to one, he had a right to neither. Nor can it be said that the measure of the plaintiff's redress rests mainly in the breast or in the action of the court; on the contrary, it rests rather in the opinion and action of the jury. The court cannot, even with the parties and witnesses before it, determine the value of the property, or the parties' right thereto. The court, by awarding a new trial, may correct an excess or irregularity of any kind on the part of the jury; but

it could have no power to find for either party upon the issue before the jury, nor augment or diminish by one cent the measure of redress established by the jury. If, then, such a power belonged not to the court when in a course of regular judicial inquiry, with the parties and witnesses fully before it, does it not seem strange to contend, that such a power can be exercised collaterally by a different tribunal, neither trying the issue, nor weighing *the evidence which the jury had before them, and in the absence of all or any of the circumstances, exercised upon *ex parte* affidavits before the jury, thereby overturning what twelve men upon their oaths, and in regular discharge of their functions, have done, and what the law through them has declared shall be the standard of value? And for what purpose, it may be asked, is this collateral inquiry to be allowed? Not, strange as it may seem, to settle any other alternate value of the property, nor to put any estimate upon it at all; but to let in other questions connected with the title, or with some proceedings in the court below, wholly disconnected with the value of the property. But it is said that the plaintiff below has released his right to the damages assessed by the jury, and therefore can no longer enforce them. What of that? What possible connection can exist between the power of the plaintiff to enforce his judgment, as affected by any act or indiscretion of his own, and the value of the property as assessed by the jury? Does the release of the estimated value render that value either greater or smaller than it was before? Possibly this act of the plaintiff may render his power to enforce the verdict and judgment less efficient; but to reason from that consequence to the value of the property as found by the jury, appears to me to be an argument as illogical as any that can be conceived. The estimated value, the true measure settled by the jury, remains unchanged, although it may have been released. The verdict has never been reversed or annulled. Moreover, it may not follow necessarily, that the release of the damages by the plaintiff below vitiates the judgment, or deprives the plaintiff of the power to enforce it; for we find by the authorities that a judgment may be by confession, or *non sum informatus*, or on demurrer, in either of which cases judgment may be entered, and that afterwards, if the defendant will not deliver the property, damages for the value and for the detention may be assessed; and such value, when assessed in the proper, regular, legal mode, is all for which execution can be had against the person or property of the defendant. But the inquiry is not properly instituted here whether the plaintiff, by error or indiscretion, has lost the power of enforcing his

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verdict and judgment; the question is purely one of jurisdiction, dependent upon the value of the subject, and that value ascertained by all the solemnities, and in the only mode known to the law,—solemnities, as I contend, nowhere to be properly gainsaid. Let it be supposed that there had been no release of damages or value by the plaintiff below. The principles *183] applicable to the action of this court would be precisely those involved in the case as it now *stands. Then let it be supposed that, after taking jurisdiction upon this collateral inquiry, this court should come to the conclusion that there was no error in the proceedings and judgment in the court below. What manner of mandate would be sent to that court? Would this court, upon its own estimate of the value of the subject founded upon affidavits, and because it had claimed jurisdiction upon such an estimate, order the Circuit Court to augment the damages assessed to the plaintiff below? Could they by so doing open again that which had become *res judicata?* If they should not do this, they would confessedly have effected a wrong to the plaintiff; and if they should attempt to do so, I desire to know their authority for such a proceeding, and what standard or measure for their mandate they would adopt; they would have repudiated the verdict of a jury and a judgment of the court, and what higher or other standard they would adopt I am at a loss to conceive. In defence of the proceeding permitted in this case, it has been contended that, by the practice of this court, in cases sounding in damages purely, a plaintiff is permitted to confer jurisdiction on this tribunal by laying his damages at an amount *ad libitum*, sufficient for that purpose. If the practice of this court is to be understood in the latitude in which it is just expressed, that practice must be deemed to be in consonance with neither the letter nor the spirit of the statute. In cases arising *ex contractu* or *quasi ex contractu*, which in their original form and magnitude might fall within the rule laid down by Congress, but which, in the progress of investigation by the application of payments or set-offs, should be brought below the minimum established by law, or in cases of tort, which, from their peculiar character, might also come within the reason of the same rule, (though the latter must be regarded as liable to strong doubt,) jurisdiction may be claimed. But if either the practice, or any express annunciation from this court, is to be apprehended as placing it at the option of parties, plaintiffs or defendants, to refer all their contests to this tribunal, however their character may be stamped and ascertained by the decision of the inferior courts, and in contravention of such solemn decisions, given upon full

investigation by courts and juries, why then, by the rules or the practice of this court, the act of Congress is substantially repealed, and the proceedings of the courts below are a mere mockery. The value of the subject of the controversy, as ascertained in the court below, supplies the only safe and uniform rule as to jurisdiction, in cases wherein jurisdiction is dependent on value. My opinion, therefore, is, that it is incompetent to either of the parties, or to this court, in the indirect *and collateral mode here attempted, and upon evidence entirely dehors and unconnected with the record, to impeach or inquire into the verdict and judgment rendered in the District Court of Texas; that such a proceeding is utterly subversive of the act of Congress limiting the right to appeals and writs of error, and equally subversive of the fundamental rule of pleading and of evidence, which establishes undeniable verity in the solemn proceedings of courts acting within the sphere of their jurisdiction, and establishes every fact and every conclusion embraced within the scope of those proceedings. [*134

Order.

On consideration of the motion made by Messrs. Hughes and Howard, on a prior day of the present term of this court, to wit, on Friday, the 25th day of January last past, to dismiss this writ of error for the want of jurisdiction, and of the arguments of counsel thereupon had, as well in support of as against the same, it is now here ordered by this court, that the said motion be, and the same is hereby, overruled.

SAMUEL VEAZIE, COMPLAINANT AND APPELLANT, *v.* NATHANIEL L. WILLIAMS AND STEPHEN WILLIAMS, DEFENDANTS.[1]

Where false steps are taken to enhance the price of property sold at auction, a court of equity will relieve the purchaser from the consequences and injury caused by these unfair means.

Therefore, where the owners had instructed the auctioneer to take $14,500 for the property, and the real bids stopped at $20,000, and the auctioneer, even without the consent or knowledge of the owner, continued to make fictitious bids until he ran it up to $40,000, this was a fraud upon the purchaser.

These sham bids could not have been made by the auctioneer upon his own

[1] Reported below, 3 Story, 611.

account. Even if they had been so, it is very questionable whether they would have been valid.

Being the general agent of the owners, the latter are responsible for his acts if they receive the benefit of them. By-bidding or puffing by the owners, or caused by or ratified by them, is a fraud, and avoids the sale.[1]

The sale being made on the 1st of January, 1836, but the fraud not discovered until 1840, and the bill being filed in 1841, there is no sufficient objection to relief owing to lapse of time.[2]

A release given by the purchaser to the auctioneer, for the purpose of making him a competent witness, did not operate as a bar to a recovery against the vendors. He would have been a competent witness without it.

There was no necessity for making the auctioneer a defendant in the suit.

The various modes of relief examined.

THIS was an appeal from the Circuit Court of the United States for the District of Maine, sitting as a court of equity.

*135] The complainant, Veazie, resided at Bangor, in the state of *Maine, and the defendants in Massachusetts, viz., Nathaniel L. Williams at Boston, and Stephen Williams at Roxbury.

The facts of the case were these:

On the 1st of January, 1836, Nathaniel L. Williams and Stephen Williams were the owners of two mill privileges, situated on Old Town Falls, in the town of Orono and state of Maine. On that day, they offered the property for sale, at public auction, in the town of Bangor. The whole controversy in the case having arisen respecting the manner in which the sale was effected, it is necessary to state the circumstances as they were disclosed by some of the witnesses. The owners employed Mr. Stephen H. Williams to proceed to Bangor and attend to the sale, who hired an auctioneer by the name of

[1] A person interested in an auction sale requested the auctioneer to bid $2,500 for him; this was accordingly done, and, no higher bids being made, the property was knocked off to such person. *Held*, that as it appeared that the auctioneer's authority to make such bid was fairly used, the sale was valid. *Richards* v. *Holmes*, 18 How., 143, 148.

An agency simply to bid a particular sum for a purchaser, amounting to no more than receiving from the purchaser, before the sale, a bid which is to be treated as if made there by the purchaser himself, is not necessarily inconsistent with any duty of the auctioneer, and does not enable any one to avoid the sale. *Ib.*

An association of persons may lawfully appoint one of their number to bid for them at a sale, in the absence of actual or constructive fraud. *Platt* v. *Oliver*, 2 McLean, 267; s. c. 3 How., 333, and notes, *q. v.*; *Kearney* v. *Taylor*, 15 How., 494.

In some jurisdictions it is still held that an auctioneer making a sale cannot act for himself, or *any other person*, in bidding for the property. *Brock* v. *Rice*, 27 Gratt. (Va.), 812.

Where defendants employed a puffer to bid at a partition sale, with intent to impose upon plaintiffs and induce them to bid more than they would otherwise have done, and plaintiffs were thereby induced to purchase the property at a higher price than they would otherwise have bid for it—*Held*, that the sale should have been set aside absolutely, on defendants' application, and that the denial of a motion therefor should be reversed. *Fisher* v. *Hersey*, 17 Hun (N. Y.), 370.

[2] See note to *Oliver* v. *Piatt*, 3 How., 333.

Head to effect it. The most material parts of the transaction are thus stated by Head, who was examined as a witness on the part of the complainant.

"I was employed, in the winter of 1836, by a son of one of the Messrs. Williams, to sell certain real estate in Orono, as an auctioneer. The estate sold was mill privileges, situated in Old Town, near Old Town Falls. It was put up at a minimum price of $14,500, but it is my impression that the minimum price was not fixed or named at the sale; but it commenced at a much lower sum, which I have now forgotten, and run on up to about eighteen thousand dollars; it might have been more or less. I then received from Samuel J. Foster bids, who was the only person that bid, to my recollection, after the sum last named. Foster bid a hundred dollars, and I then advanced upon him; he then bid again, another hundred dollars, or some other sum; I again advanced upon him, and so on, till the bid got up to forty thousand dollars, when it was struck off to Samuel J. Foster. I don't recollect the terms of sale. A certain per cent. was to be paid down, but what it was I don't recollect."

To the third interrogatory. "I don't recollect that said sale was conditional, except as I have stated. I don't recollect the sum first offered, but it is my impression that it was something like five thousand dollars. I don't recollect what the bids were from that sum. My impressions are, that Samuel J. Foster, Ira Wadleigh, John B. Morgan, and, I think, James Purrington, were the bidders. There might have been others. The highest sum bid by any person other than the purchaser was somewhere in the vicinity of eighteen thousand dollars, to the best of my recollection."

To the fourth interrogatory. "I have already answered, as near as I can recollect, as to the highest sum offered as a bid, *except that at which it was struck off. After other bidders stopped, he, Foster, bid a hundred dollars, or so. I then advanced upon him, and he then again bid, and so on up to forty thousand dollars." [*186

To the fifth and a half interrogatory, viz., "What was the highest sum offered as a bid at said sale, which you received as a bid, except the bids offered by said Foster?"—"It was somewhere about eighteen thousand dollars, as I have already answered. The actual bidders were about to that sum, as near as I can recollect. It is my impression that I advanced from that sum, or thereabouts. I cannot say for a certainty from what sum I so advanced. But I think it could not have exceeded twenty thousand dollars at which the actual bidders

stopped, and my impression is, that they ceased to bid beyond eighteen thousand dollars."

To the sixth interrogatory. "I never communicated said facts to said Veazie, to my knowledge. I cannot recollect when I first communicated them to any one who would have been likely to have communicated them to Veazie. About six months ago, J. P. Rogers, Esq., came to me, and said that he had knowledge of certain facts that I knew. I did not know what he meant. He then referred to the sale of this property. I did not tell him anything about it at that time. He called on me again; I refused, as I did not know but I might implicate myself. Afterwards, he called again, and I then told him, if Veazie would give me a writing holding me harmless, I would state the facts. He said he would give me such a writing, as attorney for Veazie, which would be good. He did so, and I then went forward and gave my deposition in a case between the parties, as to the facts of the case."

To the ninth cross-interrogatory. "Said defendants, nor any agent of theirs, did not request me to employ any by-bidder at the sale, nor to use any other than fair and lawful means to enhance the price of the said property."

Samuel J. Foster, who was the person employed by Veazie, the complainant, to bid for him thus testified:—

To the second interrogatory. "I did attend said auction sale in the winter of 1836. It was held on the 1st day of January, 1836, at the Penobscot Exchange, in Bangor. Certain mill privileges and appurtenances, situate near or on the Old Town Falls, was the property sold."

To the third interrogatory. "The highest sum bid for said property was forty thousand dollars. I bid it, and was acting and bidding for Samuel Veazie."

*137] To the fourth interrogatory. "Previous to the sale, I was *instructed by General Veazie to bid to the amount of twenty thousand dollars. At the time of the sale, after the bidding had gone up to twenty thousand dollars, Mr. Veazie came to me, under considerable excitement, and told me to advance and bid it off. I have no distinct recollection what my first bid was, but my impression is, that I commenced with about five thousand dollars. It advanced pretty rapidly, till it amounted to fifteen or sixteen thousand dollars. I think, between that point and twenty thousand, the bidding was not very prompt, but it went on finally from twenty thousand, till it was struck off to me at forty thousand dollars. I think I did not communicate my relation to General Veazie to any one, until the property was knocked off. I then notified Mr. Bright, the agent of the defendants, a Mr. Williams, the son

of one of the defendants, and Mr. Head, the auctioneer, that I bid for General Veazie, and the parties made arrangements to meet, the afternoon of the same day, at the office of William Abbot, Esq., in Bangor, to settle and close the business."

To the fifth interrogatory. "John Bright, who acted as agent, and a Mr. Williams, son of one of the defendants, were present, apparently acting for them. I have no recollection of their making any remark at the time of sale, nor that they did anything, at that time, about the sale."

To the fifth and one half interrogatory. "My impression is, that I saw or heard no bidding after it got up to sixteen or eighteen thousand dollars. The biddings, audibly, or by signs, then ceased to be known to me. I observed Mr. Wadleigh, and believe he was present from the beginning to the close of said sale. My impressions are very strong that I noticed Mr. Wadleigh's biddings till it reached to sixteen or eighteen thousand dollars. After that, I am positive that there were no signs, or open bids, that would enable me to discover who, or that any one, was bidding against me. I endeavored to discover if Wadleigh was doing so, and could find no sign or nodding from him, or from any one else."

Ira Wadleigh, also a witness on the part of the complainant, thus testified:—

To the second interrogatory. "I know the property, and that it was sold to Samuel J. Foster at forty thousand dollars. About a month before the sale I was in Boston, and called on Nathaniel L. Williams to see if he would sell me the property. He said they thought of putting it up at auction, and would let me know in a few days, as soon as he could see his brother Stephen. I advised him to sell, so that mills could be built that winter. *On coming out of Boston, I met Stephen [*138
Williams's son, Stephen H. Williams, who was coming down to see to selling the property; and after he reached Bangor, I saw him here, and talked with him about the property, and asked him if he would sell it at private sale. He told me he would sell it for fifteen thousand dollars or thereabouts;—I think he told me so. Afterwards it was advertised to be sold at the Exchange in Bangor. Stephen H. Williams appeared to be acting for the defendants."

To the third interrogatory. "The property was sold at auction; I was present at the sale, and bid I cannot say how many times, nor what sums I bid; but somewhere from fifteen to twenty thousand dollars. I don't remember bidding over twenty thousand dollars, although I might have done so. Nicholas G. Norcross bid; I think Myrick Emerson bid, and Samuel J. Foster, and some others; but I do not recollect

who. I cannot tell how much they bid, but from where it started up along, but how far I cannot say."

To the fourth interrogatory. "When they first commenced, the bids were audible, and properly made; but after they got up to twenty thousand dollars and over, it was by signs."

To the fifth interrogatory. "I saw General Veazie at the auction; he was about the room there; and was walking back and forth in the long entry part of the time. I did not see anything very particular in his manner. I did not mind much about it."

To the sixth interrogatory. "I talked with Head before the sale, and told him I wanted to buy it. He asked me how high I would go. I told him to seventeen thousand dollars, if I could not get it for less. I agreed with Norcross to take it at that sum; and told Head that I would hold my pencil between my thumb and forefinger, and turn it for a bid. I soon went up to twenty thousand and upwards, and stopped. I found the bidding was going on without my nodding, turning my pencil, or making any sign, and stepped up to Head, and asked him if he was bidding for me. He made no answer; and I said, 'For God's sake, don't bid any more for me,' and went and sat down and bid no more. After the sale I had a conversation with young Williams, and, I think, told him how the bidding went on; but he must have seen it, as he was sitting behind, and close to Mr. Head. He said he was surprised at the sale; that the property sold for much more than they expected."

To the seventh interrogatory. "There were four privileges; and they were not then actually worth more than two thou-
*139] sand dollars a privilege. I don't believe it would sell to-day *for four thousand dollars at auction,—the whole property, that is, the four privileges."

Four other witnesses, viz., Myrick Emerson, Levi Young, Richard Moore, and Isaac Smith, who were present at the sale, were examined on behalf of the complainants, whose evidence corroborated that of the preceding witnesses, as far as mere spectators could have any knowledge of the transaction.

Ten witnesses were examined on the part of the defendants. Stephen H. Williams, the authorized agent of the owners of the property, thus testified:—

"My name is Stephen H. Williams. I am thirty-four years old. I am a merchant, and reside in Roxbury; I know the said parties. Mr. Veazie resides in Bangor, and is the president of a bank; I don't know his occupation. Mr. Williams resides in Boston, and is retired from business; he is my uncle.

"To the second interrogatory he says:—In the winter of 1835–36, I was employed by the defendants to go to Bangor, and act as their agent in selling at auction certain mill privileges, at Orono or Old Town; I went to Bangor; the sale took place, January 1, 1836; the property was sold by Henry A. Head, as auctioneer, and was knocked off to a man named Foster, but Mr. Veazie was the purchaser. The price was forty thousand dollars.

"To the third interrogatory he says:—On arriving at Bangor, being a stranger, I made inquiries of Mr. John Bright as to who was the most respectable auctioneer in the place, and he referred me to Mr. Henry A. Head, as the person employed in disposing of the government lands, and in his opinion the most desirable auctioneer. I accordingly applied to him to dispose of the property, and he consented to do so. On the day of the auction, previous to commencing the sale, he asked me what amount was to be paid to him for his services; being unacquainted with the amount of commissions usually paid to an auctioneer, I told him that he should be paid what was customary. Nothing further was said respecting his fees previous to the sale.

"To the fourth interrogatory he says:—I have already answered this interrogatory in my reply to the third interrogatory.

"To the fifth interrogatory he says:—I did not authorize, or request, or in any way suggest to the said auctioneer, to bid himself on the said property, or employ any other person to do so, or to do or permit any thing unfair, unusual, or in any way improper, to be done at the said sale to enhance the price of the said property; and I did not know, nor had I any reason to believe, that he intended to do so.

*"To the sixth interrogatory he says:—I did not, nor [*140
did any one authorized by me, make any bid on the said property at the said sale.

"To the seventh interrogatory he says:—I knew the said Wadleigh, at the time of the sale, so as to speak to him; he was present at the sale.

"To the eighth interrogatory he says:—I did see the said Wadleigh, while the sale was going on, go up to the auctioneer and speak to him; the bid had then gone to thirty-nine thousand dollars. He did not go up and speak to him more than once; I am distinct in my recollection on this point.

"To the ninth interrogatory he says:—I did ask the auctioneer immediately after the sale what Mr. Wadleigh had said to him, when he came up to him during the sale, and he replied to me, that, on going into the room immediately pre-

vious to the sale, Mr. Wadleigh gave him unqualified authority to purchase the property for him, or, in other words, had told him that, when the property was knocked off, it was to be his (Wadleigh's). He (the auctioneer) also told me that, when Wadleigh came up to him on that occasion, he said to him, 'For God's sake stop, and bid no more for me.'

"To the tenth interrogatory he says:—The property was knocked off to a Mr. Foster, but after the sale, much to my surprise, I found that Mr. Veazie was the purchaser. He had told me previous to the sale, that he would not give more than twelve thousand dollars for it. He immediately desired a bond for the delivery of the deed. The bond was accordingly drawn, with a penalty of fifty thousand dollars, for the delivery of the deed, at Bangor, within ten days or a fortnight. After receiving the bond, and while he was folding it up, he said to me that he thought it proper to state, now that he was secure himself, that an express had been fitted out for the purpose of purchasing this property before the news of the sale, by auction, could reach the owner; and it is my impression that he said that Mr. Wadleigh was engaged in it, but of this I am not positive. I left to go to Boston and obtain a deed and return to Bangor. I remained in Boston a day or two to complete the deed, which having been done, I set out to return to Bangor. Between Boston and Portsmouth I found, by some conversation with the passengers, that Mr. Veazie had passed us on the road going to Boston. I accordingly made arrangements to return to Boston and meet him, and thus save my journey to Bangor. On returning to Boston I found he had left there an hour or two previous to my arrival. A day
*141] or two after, I started for Bangor again, and overtook Mr. *Veazie at Portland. We then travelled together to Bangor. During the journey, he told me that he had made up his mind to give forty thousand dollars for the property; that it had been canvassed in his family, and arrangements been made to that effect, and that he had secured this Mr. Foster to hold him harmless to that amount, and that the journey he had made to Boston was to obtain knowledge that I had a deed for him, as he was suspicious, on the return of those who went on the express, that they had succeeded in their design. And, by way of showing his anxiety, he told me that he had left Bangor for Boston on the evening of a large party given by his wife. He said that the value of this property to him was caused by a quarrel and lawsuit between him and Wadleigh, which rendered it of vast importance to either of them to obtain the property. He also said, that he

had traced the person who conducted the express as far as the Tremont House, and there all trace of him was lost.

"To the eleventh interrogatory he says:—Previous to and on the morning of the sale, Mr. Veazie manifested much indifference as to the purchase of the property, observing that he would give twelve thousand dollars for it, and no more. Of course I was surprised when I found he had given forty thousand dollars for it.

"To the fourth cross-interrogatory he says:—Immediately after the sale, I was informed by the auctioneer, that, when Wadleigh stopped him at thirty-nine thousand dollars, he (the auctioneer) then bid the remaining one thousand dollars on his own responsibility, alternately with Foster. On my return to Boston, I related this (with every thing else that had transpired) to the defendants, my employers."

John Bright, who was the agent for the owners of the property prior to the arrival of Stephen H. Williams, thus testified to the fourth interrogatory:—

"I did not, nor did any one to my knowledge or belief, request or authorize, or in any way suggest to the auctioneer, or any other person, to bid at said sale, in behalf of the defendants, or to make any fictitious or pretended bid at the said sale, or to do anything, or permit anything to be done, unfairly, to enhance the price of the said property."

To the fifth interrogatory:—

"I did attend the sale. I did not bid on the property, nor did I then know, nor had I cause to believe, that said auctioneer was himself bidding on the said property, nor that any one was bidding on said property for the defendants, or was using any unfair means to run up said property, or to enhance the price thereof."

*The witnesses all concurred, that there had been a great depreciation in the market value of mills and [*142
mill privileges since January 1, 1836.

The terms of sale were ten per cent. of the purchase-money payable immediately, and twenty per cent. more upon the delivery of the deed. These two sums together made $12,000, all of which was paid by Veazie. The balance, being $28,000, was divided into two notes of $14,000 each, payable in one and two years. The first was also paid, and the interest upon the second up to the 1st of January, 1840. The amount still due was, therefore, one note of $14,000, with interest from the 1st of January, 1840. Upon this note suit was brought against Veazie, prior to the filing of the bill in this case.

These were the circumstances attending the sale, as stated by the principal witnesses.

On the 21st of July, 1841, the following release was executed by Veazie to Head, viz.:—

"Know all men by these presents, that I, Samuel Veazie, of Bangor, in the county of Penobscot, and state of Maine, Esquire, in consideration of one dollar to me paid by Henry H. Head and Nehemiah O. Pillsbury, both of said Bangor, auctioneers, and late copartners in the auction business, under the firm and style of Head and Pillsbury, the receipt whereof I do hereby acknowledge, do hereby release and discharge said Head and Pillsbury, jointly and severally, from all damages by me sustained, or supposed to be sustained, and from all action, or causes of action, to me accrued, or accruing in consequence of any misfeasance, nonfeasance, or malfeasance, or any illegal management by them done, performed or suffered, at the sale at auction of Nathaniel L. Williams and Stephen Williams's real estate, situated in Old Town, in said county of Penobscot, on or near Old Town Falls, so called, which was sold at auction on or near January 1st, 1836, by the said Head and Pillsbury, as auctioneers; hereby, also, releasing the said Head and Pillsbury from any claim for damage, by or in consequence of any of their proceedings relating to said sale of said property.

"In witness whereof, I have hereto set my hand and seal, this 21st day of July, A. D. 1841.

"SAMUEL VEAZIE. [L. S.]"

This release was introduced into the cause by agreement of counsel, filed at a subsequent stage of the proceedings; by which agreement it was admitted that neither the respondents *143] nor their counsel had any knowledge of the existence of the *release until after the publication of the evidence in the suit, and also further admitted, that the release and circumstances under which it was given might be referred to and made use of in the cause with the same effect as if the same had been put in issue by a cross-bill and admitted by the answer. It will be seen by referring to the third volume of Story's Reports, page 66, that Mr. Justice Story did not consider this agreement as a proper mode of introducing the release into the cause, when it came up before him for argument. According to his suggestion, the proper steps to do so were immediately taken by filing a supplemental bill. These remarks are here made for the purpose of connecting the report of the case in 3 Story, 54, with this statement.

On the 23d of July, 1841, Veazie filed his bill of complaint

on the equity side of the Circuit Court of the United States for the District of Maine.

The bill stated, that, on January 1, 1836, defendants owned two mill privileges in Maine, and on that day offered them for sale, at auction, at Bangor, in Maine, employing one Head as auctioneer, and, by themselves or agent, instructed Head to put them up, beginning with $14,500, minimum, and prescribed certain conditions of sale as to payment; that the complainant, relying on the good faith of defendants and of Head, attended the sale, and bid, by one Foster as agent, and, the minimum having been offered, Head continued to announce a still higher sum, and Foster, supposing it fair and honest, made a still higher bid, and so on, until said property was struck off to Foster, for the plaintiff, at $40,000. And thereupon the complainant, supposing the sale had been conducted and the bidding made in good faith, complied with the conditions of sale, paid $4,000 in cash, $8,000 more on delivery of the deed, gave his note for $14,000 in one year, with interest, which he has since paid, and his other note for $14,000 in two years, with interest, on which he has paid the interest annually to January 1, 1840. And defendants executed a deed to complainant, and complainant a mortgage of same to defendants to secure said notes, and another of $1,900, received as part of the $8,000 aforesaid.

The bill further alleges, that there was no real bid at said auction for more than $16,000 or $18,000; but that the auctioneer, by sham bids, run up said Foster from about $16,000 to $40,000, Foster's being the only real *bonâ fide* bids over about $16,000; by means of which pretended bidding and management of the auctioneer, defendants have received from the complainant a large sum of money which they [*144 ought not *to have received; and so the complainant has been deceived and defrauded.

The bill further alleges, that complainant discovered the fraud since January 1, 1840, and notified defendants of it, and hoped they would have refunded the money; but they not only refused to rescind, but have commenced a suit on the unpaid note, which is now pending in this court, and attached complainant's property.

The defendants are requested to answer specifically,— 1. Whether they authorized the sale, and employed Head as auctioneer. 2. Whether the land was put up at the minimum stated, and if Head was directed not to sell for less, and authorized to bid for defendants to that extent. 3. What sum they agreed to pay Head, prior to the sale; what they did pay; was he to be paid any sum if there was no sale;

how he was to be paid. 4. What amount, principal and interest, complainant has paid defendants. 5. Whether the note on which defendants have brought a suit is one of those given for said purchase. 6. Whether the whole purchase-money was not paid and secured by complainant, and the deed given directly to him; and whether it was not stated and understood, at that time, that Foster acted simply as complainant's agent at said sale.

The prayer of said bill is, that said suit may be enjoined, the note delivered up, the sale rescinded, and the money paid back with interest.

The answer admitted the ownership, and that defendants employed one Bright to advertise the property for sale at auction on January 1, 1836. That a few days before the sale they sent Stephen H. Williams, a son of one of the defendants, to Bangor, to employ an auctioneer and make all necessary arrangements. The defendants denied having instructed, intimated, or suggested to Williams, Bright, or any other person, that there should be any by-bidding or other unfairness; or that, before said sale, said Williams, Bright, the auctioneer, or any other person, received from defendants any instruction or suggestion that said property should be run up by fictitious bids, or that any thing unfair should be done.

They admit that they did fix $14,500 as a minimum, but aver that they gave no instructions to keep the same secret; that they believe the fact was well known at the sale; that they have been informed, and believe, that no bid was made by any agent of theirs in consequence of the fixing of the said minimum price, bids far exceeding that amount being immediately made by those desiring and intending to purchase.

The conditions of sale, as to payment, are admitted to have been as stated in the bill.

*145] *The answer admitted that Stephen H. Williams employed Head as auctioneer, who was said to be duly licensed, skilful, experienced, and believed to be honest. The defendants aver their belief that said Williams did not authorize or suggest any by-bidding or other unfairness by Head, but employed him as a public officer, duly empowered by the laws of Maine. They further aver, that they have been informed, and believe, that said Williams did not authorize Head to bid up to the minimum, or to make any bid on their account.

The defendants aver that they were not present at the sale; but deny that there was no real bid above $16,000 or $18,000, or any such sum; or that the auctioneer run up Foster, by

sham bids, from $16,000, or any such sum, to $40,000; or that there was no real bid above $16,000, or any such sum.

Defendants admit that complainant informed them, after the sale, that Foster was his agent, and allege that complainant exhibited great anxiety to have the conveyance made; and they have been informed, and believe, that there was great competition at the sale, both on account of the intrinsic value and the local position of the property, and that complainant authorized Foster to bid as high as $40,000.

Defendants completed the sale, gave a deed, received payment of all but the last note, and interest on that to January 1, 1840; but complainant did not notify defendants that he considered the sale invalid until January 14, 1841, and they then brought a suit, as alleged.

That more than five years and six months have elapsed since said sale, and defendants have lost the benefit of evidence as to occurrences at said sale, and there has been a great depreciation in such property, owing to an increase in the number of mills, the scarcity of timber, and financial difficulties in that region, by which mill-sites have much depreciated in value; and defendants believe that changes have been made in the property by building or altering.

The defendants do not know when, in particular, the complainant pretends to have discovered the alleged fraud; but whatever was done at the sale might have been known, on inquiry, at any time; and they pray for proof of diligence.

They believe that complainant, since the changes in value, would gladly annul the bargain, and compel defendants to repay the price, and pay for his expenditures; but they submit that this ought not to be, after such a lapse of time and the changes in condition and value, especially as they deny the fraud alleged, and any concealment, on their part, of any thing done at the sale.

*That S. H. Williams agreed to pay Head for his [*146
services what was customary, and did pay him $200,
after the sale, which defendants think was reasonable; and there was no agreement that Head was to receive nothing if no sale was effected.

It has been before mentioned, that when this cause came up for argument before Mr. Justice Story, as reported in 8 Story, 54, he suggested that a supplemental bill should be filed, for the purpose of properly introducing the release to Head into the cause.

The supplemental bill alleged that Head paid no consideration for the release, and made no satisfaction; that it was not intended as a discharge of any claim against the defendants;

and if such was its effect, it was a fraud and a mistake; that it was given because Head refused to disclose the facts, on the ground that complainant might sue him, and complainant wished to obtain proof with a view to institute proceedings in equity against defendants; that the whole agreement with regard to it was between Head and complainant's counsel, and it was signed by complainant without inquiry, and without any negotiation between Head and complainant, and no indemnity against Head's liability to defendants was asked or intended. The supplemental bill then prayed that said release may be reformed and restrained to the true intention of the parties.

The answer to this supplemental bill stated that the existence of the release was not discovered by defendants until after the testimony had been taken in the original case; that defendants now insist on it as a bar; do not know whether any consideration was paid for it; and as to the intentions of the parties, or any understanding as to its legal effect, no fraud was practised to procure it to their knowledge, or any language used that was not intended by complainant, by whom it was signed by the advice of counsel and under no mistake of fact; and it is not competent for him to control or alter it by extrinsic evidence. They have no knowledge of the intentions of the parties to it, or what inducements or agreements led to it. They have been informed by Head, that Veazie's counsel promised him an indemnity, and this was accordingly given. They deny that Head expected that, after said release, he would be liable to any action by defendants, or any construction given to the release which would prevent his being held harmless against them.

To this answer there was a general replication.

On the 3d of August, 1844, a bill of revivor was filed *147] against Louisa Williams, the widow and executrix of Stephen *Williams, deceased, and at May term, 1845, the bill was revived by consent of counsel, and the cause set down for hearing.

At the same term it came on to be heard upon the bill, answer, pleadings, and evidence, when the judges of the court, being divided in opinion on the merits of the cause, ordered and decreed that the bill be dismissed, without costs to either party.

This decision is reported in 3 Story, 612.

An appeal from it by the complainant below brought the case up to this court.

It was very elaborately argued by *Mr. Fessenden* and *Mr. Webster*, for the complainant and appellant, Veazie, and by *Mr. Davies* and *Mr. Gilpin*, for the defendants.

The points on the part of the appellant were thus stated by *Mr. Fessenden*. They were stated somewhat differently by *Mr. Webster*, as will be mentioned afterwards.

As stated by *Mr. Fessenden* they were,—

I. That the defendants were owners and sellers of the property described, at said auction sale, by and through Head, as auctioneer; and that the complainant was purchaser of the same through the agency of Foster.

II. That Head, the auctioneer, did, by pretended and illegal bidding at the sale, greatly enhance the price to the complainant; that he actually received no bid from any *bonâ fide* bidder, or person proposing to purchase, other than the complainant's agent, above the sum of twenty thousand dollars, or thereabouts; but, by illegal and fraudulent practices, induced the complainant's agent to bid, and the complainant to pay, a much larger sum than they would have done had said sale been fairly conducted.

III. That Head, the auctioneer, was the general agent of defendants for all the purposes of the sale, and in all the transactions connected therewith; and they are responsible for all his acts, and his knowledge, connected with the sale, and cannot avoid that responsibility on the ground that he was a public officer.

IV. That an auctioneer cannot legally be a bidder on his own account; and therefore, whether the bidding by Head was really for himself, as intending to purchase, or merely pretended, for the purpose of enhancing the price, it was equally a fraud upon the complainant, and vitiated the sale.

V. That defendants became actual parties to the fraud by having received information of one illegal act of the auctioneer at the sale, before the contract was closed, which they did not *communicate to the complainant, [*148 but concealed, and by which they were put upon inquiry.

VI. That equity will not allow the defendants to retain the proceeds of a fraud committed by their agent, whether they had knowledge of it or not.

VII. That Head was not a necessary party to the bill.

VIII. That the release to Head and Pilsbury is no bar,—

1. Because equity will not extend its operation beyond its legal effect and the intention of the parties, which were a release of damages.

2. Because it was a release to the agent, and not to the principal.

3. Because the defendants would have no right of action against Head and Pilsbury, should the sale be rescinded.

4. The extent and design of a release, like a receipt, are explainable by extrinsic evidence.

IX. That the claim of the complainant to rescind the contract is not barred by lapse of time.

Because six years had not elapsed between the sale and the filing of the bill, or between the discovery of the fraud and the filing of the bill, and there had been no loss of evidence or change in the actual condition of the property, such as would justify the court in refusing relief; and because the circumstances attending the sale were not such as to excite the complainant's suspicions, or put him upon inquiry.

X. Even if there was no fraud, the sale should be rescinded for mutual mistake of a material fact.

As stated by *Mr. Webster*, they were,—

1. That an auctioneer is the agent of the owner until the sale is made, and also afterwards, until he gives a memorandum in writing. This writing is given in order to avoid the statute of frauds, and in making it, the auctioneer becomes the agent of both parties.

2. That fraud by an auctioneer, committed whilst he is the agent of the vendor, vitiates a sale as thoroughly as if it had been committed by the vendor himself.

3. That it is not necessary to show that the principal was cognizant of the fraud.

4. That the auctioneer is the *alter ego* of the party who employs him. What he knows, the principal knows; or, as the rule is substantially stated in 6 Cl. & F., 448, 449, if an agent made wilfully false representations, and then made a contract, equity will relieve just as much as if the *scienter* were traced to the principal.

*149] *5. An agent to sell cannot buy. Therefore an auctioneer cannot bid for himself. This rule may not be very applicable in this case, because the auctioneer does not say that he intended to purchase the property for himself.

6. The owner of real estate, put up at auction, may protect himself in one of two ways.

1st. He may fix a minimum or starting point. If no bid is made for this amount, then it is no sale. This mode appears to have been pursued here. The minimum was fixed at $14,500, and this fact was made known to the purchasers at the sale. This fact is highly important.

2d. The owner may employ one person to bid up to the minimum, or he may bid himself. But in this mode, as in the preceding, where the bidding has reached the minimum, then all by-bidding or puffing is fraudulent, and vitiates the sale. The highest real bidder, after reaching that point, is entitled to the property.

The points stated and argued by the counsel for the defendants were the following:—

1. That neither on the allegations or form of the complainant's bill, nor on the evidence, is he entitled in the Circuit Court of the United States, sitting in equity, to the relief he prays for.

2. That neither on the allegations of the bill, nor on the evidence, is there ground to charge the defendants with fraud.

3. That the evidence does not establish any fraud on the part of Head, the auctioneer, but if it does, it will not entitle the complainant to the relief prayed for in this suit.

4. That the release of Head is a conclusive bar to the complainant's prayer for relief.

5. That, both on the facts of the case and the well settled principles of equity jurisprudence, the decree of the Circuit Court, dismissing the bill, was correct, and ought to be affirmed.

Mr. Justice WOODBURY delivered the opinion of the court.

This was an appeal from a decree of the Circuit Court in the Maine district, dismissing a bill which was brought originally by Veazie, the appellant.

As to the contents of the bill and the evidence in its support, it may suffice to say here, that the bill asked the rescission of a sale at auction, made about the 1st of January, 1836, of certain mills, owned by the respondents, and a return of the money paid, and the notes still held by them for a part of the purchase money. It asked this, on the alleged [*150 ground of imposition in *the sale by means of puffing or by-bidding, so as to advance the price about $20,000 above what it otherwise would have been. In their answer, the respondents denied any such bidding by their procurement, or that it avoided the sale if happening; and further contended, that they had been discharged from any liability which might have existed by a release to the auctioneer, one of the persons implicated in the by-bidding. The answer insisted, also, that the auctioneer should have been made a

party to the bill, and that any claim to relief by the plaintiff is barred by the lapse of time since the sale.

The leading point arising in this case involves so difficult questions both of fact and law, that they have, in some degree, divided this court, as well as the court below, and great care and discrimination will be necessary in order to reach conclusions that can be satisfactory.

The relief here is not sought, as has been objected, on account of inadequacy of price,—though that may at times be so gross as to show fraud, and might here very well raise some presumption of it. *Warner* v. *Daniels*, 1 Woodb. & M., 111; *Coles* v. *Trecothick*, 9 Ves., 234; 2 Ves. Sr., 155. But it is sought for a fraud practised in augmenting the price; or, in other words, for taking false steps to enhance it; and it is the consequence and injury caused by these unfair means that the plaintiff would avoid.

How far, then, in point of fact, was the price increased above the real bids? and by what means? A minimum price of $14,500 is clearly proved to have been fixed by the owners. The weight of the testimony is, that the real bids went only $3,500 to $5,500 higher. There is no pretence that Wadleigh —the rival or competitor of the plaintiff—bid or authorized others to bid for him above eighteen or nineteen thousand dollars, though a statement of the auctioneer to one person has been relied on to the contrary. Wadleigh denies it,—nobody testifies to it,—and nobody is produced who bid or employed others to bid higher, unless the auctioneer himself did it. The true value, also, as fixed by the owners at $14,500, tends to confirm the idea that no real, fair bid would be likely to go above $20,000,—or over $5,000 or $6,000 beyond the owner's own estimate.

It is, then, a leading feature in this case, that should not be overlooked, as it gives a stamp and character to the whole equity as between these parties in favor of the plaintiff, that the respondents fixed the minimum bid for the sale of their property at $14,500, and authorized the auctioneer to dispose of it for that amount, when in truth, by some means or other

*151] *and without any real rival bids above $20,000, they obtained for it $40,000. Whether this extraordinary result was effected by any improper conduct on their part, or that of any agent for whom they may in law be responsible, is the next prominent inquiry.

In the outset, the probability certainly is, that property like this could not be sold at auction for from $25,000 to $26,000 more than the owner asked for it, unless under some imposition or great mistake. And the further presumption seems at

first to be reasonable, that the respondents, whose property was thus sold, and by an auctioneer employed by themselves, and who have benefited by the large excess in the price given, by taking the money and securities, were either instrumental in causing the excess, or, having availed themselves of it and all its advantages, should be answerable *civiliter* for any wrong and error connected with it.

It is conceded, in point of fact, that some other bids than Veazie's went nearly to $40,000, and as no person is shown to have made them but the auctioneer, it follows that they must have been real bids by him for himself, or fictitious ones by him, with a view to increase the price to be obtained by the respondents, and to increase his own commissions on a sum so much larger than had been anticipated when the sale began.

Looking to the supposition that the bids were real and for himself, that idea is not supported, but rather disproved, by the testimony. The auctioneer does not appear to be a man of wealth, able to buy so valuable property for investment, nor was such a purchase in the line of his business or profession, nor does he seem to have had the means or disposition for speculation, and especially on so large a scale; and he must have well known that the true value of this property was not considered by the owners above $14,500, nor its value to Wadleigh as enhanced by its locality in his dispute with Veazie, as above $18,000.

The weight of the testimony, then, is decidedly against the correctness of the supposition, that the bids above $20,000, except the plaintiff's, were by the auctioneer for himself and on his own account.

Had it been otherwise, it would be very questionable whether, in point of law or equity, an auctioneer can be allowed to bid off for himself the very property he is selling. It has been laid down that he cannot. *Hughes's case*, 6 Ves., 617; *Oliver et al.* v. *Court et al.*, 8 Price, 126; 9 Ves., 234; 8 Id., 337; Long on Sales, 228; Babington on Auctions, 164. The principles against it are stronger, if possible, and certainly were enforced earlier in courts of equity than of law. An opposite course *would give to an auctioneer many [*152
undue advantages. It would tend, also, to weaken his fidelity in the execution of his duties for the owner. He would be allowed to act in double and inconsistent capacities, as agent for the seller and as buyer also; and the precedents are numerous holding such sales voidable, if not void, and at all events unlawful, as opposed to the soundest public policy. See *Michoud* v. *Girod*, 4 How., 554; 15 Pick. (Mass.), 30;

1 Mason, 344; 2 Johns. (N. Y.) Ch., 51; *Tufts* v. *Tufts*, Mass. Dist., 1848, and cases there cited; Long on Sales, 228; 9 Paige (N. Y.), 663; 1 Stor. Eq. Jur., § 315; 3 Story, 625. That an auctioneer is a general agent for the owner usually, though questioned in the argument, cannot be doubtful. See *Howard* v. *Braithwaite*, 1 Ves. & B., 209; Stor. on Agency, §§ 27, 28; 4 Burr., 1921; 1 H. Bl., 85. He is so till the sale is completed. Long on Sales, 231; *Seton* v. *Slade*, 7 Ves., 276; Babington on Auctions, 90; 20 Wend. (N. Y.), 43. And though he may be agent of the buyer after the sale for some purposes, such as to take the case out of the statute of frauds (*Williams* v. *Millington*, 1 H. Bl., 84; 3 T. R., 148; Cowp., 395; Long on Sales, 228, 60, 63; *Emerson* v. *Heelis*, 2 Taunt., 38; 1 Esp., 101), yet this does not affect the other principle, that till the sale, and before it, he acts for the vendor alone. Nor is an auctioneer a public officer in Maine, and a license required to him. 2 Laws of Maine, p. 390, ch. 184. But whether a public officer or not is a circumstance that does not generally appear to have changed the liability of the principal for his acts, if taking the benefit of them.

Treating his bids, then, as made by the auctioneer, not for himself, and the proof having failed to show that they were for a stranger, the only remaining hypothesis is, that they were made by him while agent of the owners, with a view to their benefit particularly, though with hopes of some incidental gain to himself in increased commissions. How does this view accord with the evidence of the transaction, taken as a whole? It is the only plausible aspect of it existing. The auctioneer found Wadleigh willing, on account of his quarrel with Veazie and his interests near the property, to go about $5,000 higher than the owners' estimate, and then found Veazie, for like reasons, willing to go still higher rather than let Wadleigh purchase the premises, for whom he supposed the auctioneer was bidding. In the eagerness of competition and with ample capital, Veazie seems in this way to have been induced to go even as high as $40,000, under the exciting but delusive and false impression, that he thus was obtaining the
*153] property against the efforts of Wadleigh or others, real bidders and real competitors. That *impression the auctioneer sought to create, and did create, by deceptive means.

Residing on the spot and acquainted with the character of the parties, he doubtless suspected that Veazie, rather than let the property go to Wadleigh, might bid very high,—and perhaps, by rumor, even to $40,000,—and proceeded, after the real bids were over at about $20,000, to make by-bids, either

on his own judgment, to benefit his employers and increase his own commissions, or on the suggestions or signs of Stephen H. Williams, who was present as agent of the respondents, and is proved to have sat behind and near the auctioneer at the sale.

Veazie being thus situated so as to be more easily duped by either of them, and his condition and fears and anxieties being probably known to Head, if not to Stephen H. Williams, the auctioneer, by the means before described, procured for his employers nearly treble what they expected or what had been agreed on as the minimum price. The next inquiry is, if such a transaction renders the sale in point of law void, either for fraud or mistake. In some countries, under the civil law, a buyer of immovables is of right entitled to a rescission of the sale if it turn out, though without fraud, that the price was more than fifty per cent. above the true value. Pothier on Contracts of Sale, part 5, ch. 2, § 2; and see Domat, tit. 6, § 8. Here the price was at least a hundred per cent. above,—yet there must in this country be fraud also, or a mistake.

Though no evidence is seen of fraud practised by the respondents in person, nor by their express directions, yet a fraud was evidently perpetrated by the auctioneer, as agent for the respondents, or by him in connection with Stephen H. Williams, and the respondents have taken and still retain the benefit of it. This conclusion is indisputable, whatever obscurity or concealment may have been flung over the case by the auctioneer.

Does this state of things, then, in point of law, require the sale to be relieved against, on sound principles of equity and public morals?

By-bidding or puffing by the owner, or caused by the owner, or ratified by him, has often been held to be a fraud, and avoids the sale. Cowp., 395; 6 B. Mon. (Ky.), 630; 11 Serg. & R. (Pa.), 86; 4 Har. & M. (Md.), 282; Babington on Auctions, 45; 3 Bing., 368; 2 Carr. & P., 208; 6 T. R., 624; *Rex* v. *Marsh*, 3 Younge & J., 331; 11 Moor, 283. He may fix a minimum price, or give notice of by-bids, and thus escape censure. Ross on Sales, 311; *Howard* v. *Castle*, 6 T. R., 642. *But this shows that, without such notice, it is bad to resort to them. *Crowder* v. *Austin*, 3 Bing., 368; 3 Younge & J., 331. "The act itself is fraudulent," says Lord Tenterden. *Wheeler* v. *Collier*, 1 Moo. & M., 126. [*154

The by-bidding deceives, and involves a falsehood, and is, therefore, bad. It violates, too, a leading condition of the contract of sales at auction, which is that the article shall be knocked off to the highest real bidder, without puffing. 2

Kent Com., 538, 539. It does not answer to apologize and say that by-bidding is common. For, observed Lord Mansfield, "Gaming, stockjobbing, and swindling are frequent. But the law forbids them all." Cowp., 397. In *Bexwell* v. *Christie*, Cowp., 396, the pole-star on this whole subject, it is said,—"The basis of all dealings ought to be good faith. So more especially in these transactions, where the public are brought together in a confidence that the articles set up for sale will be disposed of to the highest real bidder."

Even in a court of law, Lord Kenyon has, with true regard to what is honorable and just, said,—"All laws stand on the best and broadest basis, which go to enforce moral and social duties." *Pasly* v. *Freeman*, 3 T. R., 64. See also *Bruce* v. *Ruler*, 2 Man. & Ry., 3. And in *Howard* v. *Castle*, 6 T. R., 642, he held that Lord Mansfield's doctrine, that all sham bidding at auctions is a fraud, was a doctrine founded "on the noblest principles of morality and justice."

Nor does it lessen the injury or the fraud if the by-bidding be by the auctioneer himself. He, being agent of the owner, is equally with him forbidden by sound principle to conduct clandestinely and falsely on this subject. Cowp., 397. All should be fair,—above-board.

Indeed, in point of principle, any fraud by auctioneers is more dangerous than by owners themselves. The sales through the former extend to many millions annually, and are distributed over the whole country, and the acts accompanying them are more confided in as honest and true than acts or statements made by owners themselves in their own behalf, and to advance their own interests. Great care is therefore proper to preserve them unsullied, and to discourage and repress the smallest deviations in them from rectitude.

Here the auctioneer virtually said to his hearers, when he made a fictitious bid,—"I have been offered so much more for this property." But he said it falsely, and said it with a view to induce the hearers to offer still more. He averred it as a fact, and not an opinion; and as a fact peculiarly within his knowledge. Now if, under such an untrue and
*155] fraudulent assertion, *persons were persuaded to give more,—relying, as they had a right to, on the truth of what was thus more within the personal knowledge of the auctioneer, and was publicly and expressly alleged by him, and being of course more willing to give higher for what others had offered more, who probably were acquainted with such property and had means to pay for it,—they were imposed on and injured by the falsehood. It is said—"A naked, wilful lie, or the assertion of a falsehood knowingly, is certainly evidence

of fraud." 1 Const. (S. C.), 8. The following authorities support the views here laid down. 3 Younge & J., 331; Moo. & M., 123; 2 Carr. & P., 208; *Bexwell* v. *Christie*, Cowp., 395; *Howard* v. *Castle*, 6 T. R., 642; 1 Hall (N. Y.), 146; 1 Dev. (N. C.), 35; 6 Cl. & F., 444, 329.

Some cases, and some reasoning found in them, attempt to sanction a contrary doctrine, if the by-bids were made merely to prevent a sacrifice of the property,—a "defensive precaution,"—but not otherwise. *Connolly* v. *Parsons*, 3 Ves., 625, note; *Smith* v. *Clarke*, 12 Id., 477; *Steele* v. *Ellmaker*, 11 Serg. & R. (Pa.), 86; *Woodward* v. *Miller*, 1 Collier, 279; 5 Madd., 34.

These exceptions still concede that the by-bidding, when an artifice to mislead the judgment and inflame the zeal of others,—"to screw up and enhance the price," in the language of Sir William Grant,—is fraudulent and makes the sale void. 12 Ves., 483; 2 Kent Com., 537.

Some cases hold, too, that the by-bidding will not vitiate, if real bids besides those of the vendee occurred after. 3 Ves., 620. But neither of these excuses or apologies existed here. These by-bids were made after some thousands of dollars had been offered over the value of the mills, as estimated by the owners themselves, and were palpably made "*to screw up*," or enhance the price. Any other excuses, which have ever availed, either are anomalies, or rest on a false analogy. Thus, at one time in England duties on auctions were remitted, if the property was bought in by the owner. 3 Ves., 17, 621; 1 Fonbl. Eq., 226. This, however, was founded on the theory that no sale had taken place, and hence no duty should be paid, rather than that a sale under such circumstances was valid. It, therefore, strengthens rather than impairs the view taken of the present case.

It is no answer to this reasoning to say, as has been done, that Veazie bid voluntarily, or expressed satisfaction with his purchase, and was in haste to close it up. Because, in all this, he was laboring under a misapprehension that others *had honestly valued the property near the same [*156 price, and been in truth as anxious as himself to bid it off,—and because he believed that he had thus succeeded against a real rival in securing the mills and some incidental advantages,—when in reality there had been no such honest bids over $20,000, and he had been contending against a man of straw falsely set up by the auctioneer. In short, he had been imposed on by the agent of the respondents; and that by virtual falsehood, and in a point material, and in a manner likely to mislead. He was not allowed to exercise his judgment,

and bid higher or not on the truth,—on facts,—but on falsehoods. 6 T. R., 644. He was not the highest bidder at $40,000, except through deception wrought on him fraudulently. Id. Secrecy was practised,—privacy as to the real offers,—stratagem,—which, as already seen, is in the teeth of the great principles of a valid public sale. *Bexwell* v. *Christie*, Cowp., 396; 2 Kent Com., 539.

A technical objection to the quantity rather than weight of the evidence has been urged, which it may be well to dispose of here. It is said that fraud is denied as to the defendants, and is not proved against them by two witnesses. It is conceded that the denials that the respondents were personally guilty of fraud, or expressly directed falsehood and fraud, are not overcome, nor are they in controversy. But it is the puffing or by-bidding of the auctioneer, their agent, which is in controversy as a fact. As to that they can make no denial from any personal knowledge pro or con,—not having been present; and hence their answer furnishes no evidence in respect to it, as an independent fact. But this fact being substantiated by the agent, and the matter proved by others, as to no real bids being made over $20,000, and by various other circumstances in the case, the amount of evidence for it is ample. It is true, they deny that they ordered it. It is to be remembered, however, that they are not held liable here merely by declarations of their agent, when not ordered by them or perhaps known to them at the time,—though it is a sound doctrine that the verbal declarations of an agent at a sale often bind the principal. 1 Ves. & B., 209; 6 Cl. & F., 448, 449; Story on Agency, § 107. And that the agent is bound to disclose all and to act as the principal is when present, and selling. 1 Metc. (Mass), 560; *Hough* v. *Richardson*, 3 Story, 698; 3 Hill (N. Y.), 260; 1 Woodb. & M., 353. And that a principal so acting in person cannot be justified in asserting what is false, and by which another is injured. *157] *Pasly* v. *Freeman*, 3 T. R., 51; *Vernon* v. *Keys*, 12 East, 632; 2 Id., 92. And that what the *vendor may not do in person, or may not employ others to do in his absence,—that is, make by-bids to enhance the price,—his agent, the auctioneer, cannot rightfully do.

But they are held liable on a ground beyond and apart from all this, and as well settled in England as here, that if a principal ratify a sale by his agent, and take the benefit of it, and it afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled, and the parties placed *in statu quo;* or they may, where the case and the wrong are divisible, be at times relieved to the extent of the injury.

The principal in such case is profiting by the acts of the agent, and is hence answerable *civiliter* for the acts of the agent, however innocent himself of any intent to defraud. 13 Wend. (N. Y.), 513; 1 Vt., 239; 1 Salk., 289; 7 Bing., 543; *Mason et al.* v. *Crosby et al.*, 1 Woodb. & M., 342, and cases there cited; *Doggett* v. *Emerson*, 1 Id., 1; Story on Agency, § 451; *Doggett* v. *Emerson*, 3 Story, 700; *Olmsted et al.* v. *Hotaling*, 1 Hill (N. Y.), 317; *Taylor* v. *Green*, 8 Carr. & P., 316. Whether the principal knew all those acts or not, is not the test in this case, as in 2 East, 92 notes, and 13 East, 684, note, though it may be in some others, as in 5 Bing., 97; 6 Cl. & F., 444.

But the test here is, Was the purchaser deceived, and has the vendor adopted the sale, made by deception, and received the benefits of it? For, if so, he takes the sale with all its burdens. *Wilson* v. *Fuller*, 3 Ad. & Ell. (N. S.), 68.

The sale thus made here, was adopted and carried into effect by the respondents; and hence, on account of the fraud involved in it, they should either restore the consideration, and take back the mills, or indemnify the purchaser to the extent of his suffering.

Some miscellaneous objections to these results are yet to be considered. It is said to be justly deemed an extraordinary power in a court of chancery to rescind contracts at all, instead of leaving parties to a suit at law for their damages. Sugden on Vendors, 392; 11 Pet., 248. And that a fraud or mistake must be very manifest to justify it. 10 Price, 117; 13 Id., 349; 7 Cranch, 368; 2 Johns. (N. Y.) Ch., 603; 12 Ves., 477. And that the burden of proof to show these grounds for a rescission rests on the plaintiff, and not on the defendant. Grant this. Yet all requirements appear fulfilled here. On satisfactory proof, also, executed, as well as executory, contracts may in such cases be set aside. One case is reported of its being done after twenty years. 8 Price, 125. And a defendant is likely, in most cases, *to suffer no more by a rescission in chancery, than by damages adequate to the loss or injury. [*158

There is next the objection, that too long a time had elapsed here before seeking redress. More force would attach to this if Veazie had discovered the imposition sooner. The sale happened January 1st, 1836; the discovery of the fraud was after January 1st, 1840, and this bill was filed July 23d, 1841, after demanding redress of the respondents in January, 1841.

Having effected his object in the purchase,—to obtain the property rather than let his rival get it, who, he doubtless supposed, was bidding against him,—and being a man of

ample means, Veazie submitted, as feeling bound, to the excess of price. Nor did he suspect any imposition till informed of it within a few years; and then he seasonably applied for relief, and should not be barred from obtaining it by any lapse of time while the fraud or mistake as to the bids not being real remained undiscovered. *Doggett* v. *Emerson*, 3 Story, 740; *Daniels* v. *Warner*, 1 Woodb. & M., 90; *Doggett* v. *Emerson*, Id., 1; 8 Cl. & F., 651; 1 Russ. & M., 236.

It is said that, after this lapse of time, the plaintiff is not in a proper condition to restore the mills. 16 Me., 42. He is less likely to be, if they are ordered to be restored; but that is the fault of the fraud, and the concealment of it, rather than his fault. The defendant, too, if the property has deteriorated in value, is in no worse a condition than he would be where an avoidance of the sale takes place at law for fraud.[1]

If the plaintiff has sold the property, or disabled himself from restoring it, when ordered by a decree, then the evil consequences will light on himself, and not the defendants. That is what is meant by inability to restore the property, in 8 Cranch, 476. Nor is there any need he should aver substantively in his bill that he can restore it, this being presumed as a usual if not necessary, consequence, when he applies to have the contract rescinded, and every thing placed in *statu quo*.

The last exception to a recovery here by the plaintiff is, that the release to Head, the auctioneer, should be considered as discharging the respondents also. Neither the design of the parties to the release, nor the agreement or consideration to make it, extended beyond the auctioneer. It was suicidal for the plaintiff to pay for a release to get a witness in a case, which release would destroy the case itself. (2 Ired. (N. C.), 219.) Sitting as we do in a court of equity, we cannot, without an open and gross departure from equity, give to the release any effect beyond the design in making it, and the
*159] literal words of it, reaching *only to the discharge of the release. It is a strict rule at law, and not of equity, which goes further in any case. 7 Johns. (N. Y.) Ch., 207; 18 Wend. (N. Y.), 399; 22 Pick. (Mass.), 308. The operation was meant to be like a covenant not to sue him; and such a covenant is no bar to suing others when jointly liable. *Ferson* v. *Sanger*, 1 Woodb. & M., 138.

Again, in the present instance, there was no joint liability at law by the respondents and the auctioneer. Their accountability was separate, and resting on different grounds; his on

CITED. *Neblett* v. *McFarland*, 2 Otto, 104.

actual falsehood,—theirs on the adoption of the benefits of it, and the accountability thus arising for it. The release of one, therefore, is not like the release of a joint contractor or joint trespasser. 1 Anstr., 38. And in equity it may well be limited to the person released, and the person paying the consideration for it. Hopk. (N. Y.), 251, 334.

Beside this, Head was in law a competent witness for Veazie, without any release, his interest being against Veazie. This conclusion as to the release is an answer, likewise, to the objection, that Head ought to have been made a party to this bill. His liability resting on a separate ground, and not joint, he could not be united at law, nor is it always done in equity under like circumstances. See *Mason et al.* v. *Crosby*, 1 Woodb. & M., 342; *Ferson* v. *Sanger*, Id., 138; *Jewett* v. *Conrad*, 3 Id., ——; *Small* v. *Atwood*, 6 Cl. & F., 352, 466.

All that remains is to decide upon the most equitable course to carry these views into effect, consistent with sound principles. One mode is to set aside unconditionally the whole sale, for the fraud practised in it, and have the mills reconveyed by Veazie, and the money, notes, and mortgage returned by the respondents. Another mode is to treat as unjust only so much of the proceedings as was fraudulent; that is, the excess of price over $20,000 obtained by by-bidding, and to cause that excess only to be refunded.

To attain this last result in some way is preferable, considering the length of time which has elapsed here, and the probable deterioration in value of the mills by use and the fall of prices in the market since the inflation of 1836, and, though objected to by the respondents, is likely more than the other to secure them against loss.

To restore the excess of consideration, or to restore all and have back the mills, has in other respects much the same effect. The plaintiff in either way will obtain nothing which did not belong to him, nor the respondents lose anything which was theirs before the falsehood or mistake. It is, at the same time, *gratifying to find, that, by either [*160 of these courses, no incidental loss or inconvenience will fall on the respondents, except what has been occasioned by the misbehavior of their own agent, and the fruits of which they accepted, and which they cannot *in foro conscientiæ* retain against those injured by that misbehavior.

But there is one equitable operation before named, in relieving only as to what is fraudulent, which makes it most desirable, if legal. It is objected, first, that it will be giving damages, like a court of law, to the extent of the wrong, rather

than rescinding the whole contract on account of fraud or an evident mistake.

We are inclined to think, unless under peculiar circumstances, that damages cannot be given in a court of equity, but the parties must be left to a court of law to recover them. 17 Ves., 203; 1 Russ. & M., 88; 2 Keen, 12; 1 Cow. (N. Y.), 711; 5 Johns. (N. Y.), 193. The exceptions of damages in part, under certain circumstances may be seen in the following cases, and the authorities there quoted. 2 Story Eq. Jur., §§ 711, 779, 788, 794; 4 Johns. (N. Y.) Ch., 460; 14 Ves., 96; 9 Cranch, 456.

But the course we propose, to have the sale stand so far as not fraudulent, and to make the defendants restore only what was obtained by the puffing and fraud, is not giving damages either *eo nomine* or in substance. It requires to be surrendered merely the money and interest on it, and the notes and mortgage unpaid, which were obtained by the deception of by-bidding. This, among other things, is prayed for in the bill. This course will only carry out the established rule on this subject, laid down in elementary treatises,—that "the injured party is placed in the same situation, and the other party is compelled to do the same acts, as if all had been transacted with the utmost good faith." 1 Story Eq. Jur., § 420; 1 Madd. Ch. Pr., 209, 210; Fonbl. Eq., book 1, ch. 3 and 4, notes.

Everything is thus relieved against, to the extent to which it is wrong or fraudulent, but nothing beyond it. *Jopling* v. *Dooly*, 1 Yerg. (Tenn.), 289.

It is suggested, however, secondly, that this course does not set aside the whole sale, or whole contract, which ought to be done, if intermeddled with at all. It is true that, generally, a part of a deed, or contract, or sale, cannot be avoided without avoiding the whole. 2 Ves., 408; 1 Madd. Ch., 262. Though at times there may be a division or break in them where fraud begins and good faith ends, and where beyond that line only it would seem just to annul them. (1 Yerg. (Tenn.), 289.)

*161] *But if the whole must be annulled or none, it can be here, and yet equitable terms imposed on the plaintiff to let such part of the transaction remain undisturbed as is consistent with equity and good faith. This is justified, not only by the general principle that he must do equity who asks it, (4 Pet., 328,) but that it is one of the leading principles on this particular subject in a court of chancery, "if it should *rescind* the contract, to allow it only upon terms of due compensation, and the allowance of countervailing equities."

2 Story Eq. Jur., § 694; *Harding* v. *Handy*, 11 Wheat., 126, *Bromly* v. *Holland*, 5 Ves., 618.

So it is said, that, "when the judgment debtor comes into court, asking protection, on the ground that he has satisfied the judgment, the door is fully open for the court to modify or grant his prayer upon such condition as justice demands." *The Mechanics' Bank of Alexandria* v. *Lynn*, 1 Pet., 384.

This court on its equity side, says Chief Justice Marshall, is "capable of imposing its own terms on the party to whom it grants relief." *Mar. Ins. Co.* v. *Hodgson*, 7 Cranch, 336, 337. And it will not grant relief even in fraud, unless the party "wishing it will do complete justice." *Payne* v. *Dudly*, 1 Wash. (Va.), 196; *Semb.*, 1 Johns. (N. Y.) Ch., 478; *Scott* v. *Nesbit*, 2 Cox, 183. Here, then, in the decree, we can set aside the whole sale and contract; but, instead of doing it unconditionally, the plaintiff should be required first to do equity, and to allow any countervailing equities on the part of the respondents,—which are, to let the sale itself stand at what was fairly bid for the property, and require only the residue of the consideration, being entirely fraudulent, to be restored. 1 Story Eq. Jur., §§ 344, 599, and cases there cited; *McDonald* v. *Neilson*, 2 Cow. (N. Y.), 139, 192.

Thus, a borrower of money on usury will not be allowed relief in chancery, except on the payment of principal and legal interest. *Scott* v. *Nesbit*, 2 Cox, 183; 2 Bro. Ch. Cas., 649; 2 Story Eq. Jur., § 696; *Stanly* v. *Gadsby*, 10 Pet., 521; *Jordan* v. *Trumbo*, 6 Gill. & J. (Md.), 106; 3 Ves. & B., 14; *Fanning* v. *Dunham*, 5 Johns. (N. Y.) Ch., 143. Like terms are imposed on borrowers under void annuity bonds. (See same cases.) So, by analogy, the cases of specific performance frequently exhibit the enforcement of a part only, when just. *Pratt et al.* v. *Law et al.*, 9 Cranch, 456; *Hargrave* v. *Dyer*, 10 Ves., 506; *Harnett* v. *Yielding*, 2 Sch. & L., 553; 1 Madd. Ch., 431. So, in respect to injunctions, one may issue against a judgment for land, and stay execution for a part, and allow it to stand for the residue. *Dunlap et al.* v. *Stetson*, 4 Mason, *364. See other illustrations [*162 and cases, Com. Dig., Chancery Appendix, 6 and 18; *Fildes* v. *Hooker*, 2 Meriv., 427; 14 Ves., 91; *Wharton* v. *May*, 5 Ves., 27.

The form of a decree nearly adapted to this case may be seen in *Fanning* v. *Dunham*, 5 Johns. (N. Y.) Ch., 146.

The last real bid here being in some doubt as to its amount, whether eighteen or twenty thousand dollars, we think the weight of evidence is in favor of the last sum, and the computations are therefore to be made on that basis. The judgment

below must therefore be reversed, and a mandate sent down directing the proper decree, in conformity to these views, to be entered for the plaintiff.

Mr. Chief Justice TANEY, Mr. Justice McLEAN, and Mr. Justice GRIER dissented from this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maine, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the pretended sale of the two mill privileges, at and for the sum of $40,000, as set forth and described in the pleadings and proofs in this cause, was fraudulent, and should be set aside; but as equitable terms imposed on the complainant, he is to let the sale stand for the sum of $20,000, fairly bid by him; and that the balance of the moneys paid by the complainant over and above the said $20,000 should be refunded to him by the defendants, with legal interest thereon, and that the notes and securities given for the payment of any part of such excess should be cancelled and given up by the defendants to the complainant; that the defendants should pay the costs in this court, upon this appeal, and all the costs which have accrued in this cause in the said Circuit Court, or which may accrue therein, in carrying out the decree of this court.

Whereupon, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court dismissing the complainant's bill be, and the same is hereby, reversed and annulled. And this court, proceeding to render such decree as the said Circuit Court ought to have rendered herein, doth now here order, adjudge, and decree, that the aforesaid sale, as above set forth, be, and the same is hereby, rescinded and set aside; that the said complainant shall, as equitable terms, retain the said property at and for the said *163] sum of $20,000, part of the moneys paid by him to the said defendants, and that *the said defendants shall, on or before the third day of that term of the said Circuit Court next ensuing the filing the mandate of this court in said Circuit Court, refund and pay to the complainant all such sums of money over and above the said last-mentioned sum of $20,000, as they or either of them shall have received from the said complainant on account of the purchase of said property, together with legal interest thereon from the time or times at which they were so received by the said defendants, and that the said defendants shall, on or before the same day

of the same term of the said Circuit Court, cancel and deliver up the notes and securities given for the payment of any and every portion of the excess over and above the said $20,000. And this court doth further order, adjudge, and decree, that the said defendants do pay the costs in this court upon this appeal, and all the costs which have accrued in this cause in the said Circuit Court, or which may accrue therein, in carrying out the decree of this court. And this court doth further order, adjudge, and decree, that this cause be, and the same is hereby, remanded to the said Circuit Court, with instructions to carry this decree into effect, and with power to make all such orders and decrees as may be necessary for that purpose.

JAMES PHALEN, PLAINTIFF IN ERROR, *v.* THE COMMONWEALTH OF VIRGINIA.

In 1829, the legislature of Virginia passed an act appointing five commissioners to raise by way of lottery or lotteries the sum of $30,000 for the benefit of the Fauquier and Alexandria Turnpike Road Company. Two of the commissioners declined to act, and the remaining three took no steps to execute the power for a long time. On the 25th of February, 1834, the legislature passed an act for the suppression of lotteries, which prohibited all lotteries and sale of lottery-tickets after the 1st of January, 1837, saving, however, contracts already made which were by their terms to extend beyond the 1st of January, 1837, or contracts hereafter to be made under any existing law, which were to extend beyond that day. These were permitted to go on until the 1st of January, 1840. On the 11th of March, 1834, the legislature passed an act appointing two commissioners in the place of the two who had declined to act. On the 19th of December, 1839, these commissioners entered into a contract with certain persons, authorizing these persons to draw as many lotteries as they might think proper, without limitation as to time, upon the payment of a certain sum per annum to the commissioners.

Held, 1. That the right to draw lotteries under the act of 1829 was not a contract the obligations of which were impaired by the act of 1834.

2. That it may be doubted whether it constituted a contract at all; but that if is was a contract, it was not unlimited as to time, and the act of 1834, allowing the grant to continue *for a certain time, stood upon the [*164 same ground as acts of limitation and recording acts, which this court has said a state has a right to pass.

3. That the privilege granted by the act of 1829 had become obsolete from non-user, and the act of 1834, appointing two commissioners, did not fully revive it, because the two acts of 1834 must be taken together; and the limitation contained in one must apply to the other.[1]

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[1] It is an elementary principle in the interpretation of written law, that statutes *in pari materia* are to be construed together. *United States* v. *Collier*, 3 Blatchf., 325; *Alexander* v. *Mayor, &c.*, 5 Cranch, 1; *The Elizabeth*, 1 Paine, 10; *United States* v. *Harris*, 1 Sumn., 21; *United States* v. *Hewes*, Crabbe, 307; *Black* v. *Scott*, 2 Brock., 325; *Dubois* v. *McLean*, 4 McLean, 489; *Patterson* v. *Winn*, 1 Wheat., 385, 6; *Chandler* v. *Lee*, 1 Idaho, 349.

In construing any particular section

4. That the courts of Virginia have so construed these statutes, and this court adopts their construction.[2]

THIS case was brought up by a writ of error to the General Court of Virginia. The plaintiff in error had been convicted in the Superior Court for the County of Henrico and City of Richmond, on an indictment for selling lottery-tickets contrary to the act of Assembly of Virginia, passed on the 25th of February, 1834. The case was removed by writ of error to the General Court of Virginia, where the judgment was affirmed. That being the highest court of criminal jurisdiction in Virginia, the plaintiff in error brought his case into this court by a writ of error under the twenty-fifth section of the Judiciary Act; and now alleged that the act of 25th February, 1834, under which he was convicted, is void, being contrary to the tenth section of the first article of the Constitution, which forbids a state to pass any "law impairing the obligation of contracts."

On the trial of the case below, the jury found a special verdict, setting forth at length the several acts of Assembly of Virginia, and the contract under which the defendant in the enactment claimed a right to sell lottery-tickets and to be exempted from the penalties of the act of February, 1834, under which he was indicted.

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of any statutes forming a part of the system of practice, if it be intricate, obscure or doubtful, its meaning is to be ascertained by comparing it with the other sections, or parts, in the light of the general legislative intent disclosed by the whole system, with respect to the section or part questioned. *Levy* v. *Loeb*, 44 Superior (N. Y.), 291; *affirmed*. 75 N. Y., 609.

The latter of two inconsistent sections of one and the same statute must prevail. *Ryan* v. *State*, 5 Neb., 276; *Gibbons* v. *Brittenum*, 56 Miss., 232; *Albertson* v. *State*, 9 Neb., 429.

Where two distinct statutes conflict the one last enacted must prevail. *Swinney* v. *Fort Wayne &c. R. R. Co.*, 59 Ind., 205; *State* v. *Jersey City*, 11 Vr. (N. J.), 257; *Lehman* v. *Robinson*, 59 Ala., 219.

Where one statute refers to another one for the power given by the former, the statute referred to will be deemed to be incorporated in the one making the reference. *Nunes* v. *Wellisch*, 12 Bush (Ky.), 363. If the statute thus referred to has been amended, the amendments, though not mentioned, will also be incorporated. *Matter of Mundy* v. *Excise Comm'rs*, 9 Abb. (N. Y.), N. C., 117.

In construing a statute effect must be given, if practicable, to all of the language employed, and inconsistent expressions are to be harmonized, if possible, to reach the real intent of the legislature. *Matter of New York and Brooklyn Bridge*, 72 N. Y., 526, 530.

[2] The highest court of a state is the supreme authority in the interpretation of the statutes of the state. *Lamborn* v. *County Comm'rs*, 7 Otto, 181; *Davie* v. *Briggs*, Id. 628, 637.

The construction placed upon the statute of another state by the courts of that state is, as a general rule, controlling, and will be followed by the courts of this state. *Jessup* v. *Carnegie*, 80 N. Y., 441. *It seems*, however, that where a statute has been construed by the courts of the state whose legislature enacted it, and obligations have been entered into on the faith of such decisions, a subsequent decision giving a different construction will not control as to such prior transactions. *Ib.*

It appears that in December, 1828, the President and Directors of the Fauquier and Alexandria Turnpike Road presented a petition to the Legislature of Virginia, setting forth the importance and value of their road to the public; that by the exertions of the directors and a few of the stockholders, and on their responsibility, money had been raised, and the road put in excellent condition, except three miles, which required much repair; and asked a law authorizing a lottery to raise $30,000.

On the 30th of January, 1829, the Legislature passed an act appointing five commissioners, "whose duty it shall be to raise, by way of lottery or lotteries, the sum of $30,000, for the purpose of improving the Fauquier and Alexandria Turnpike Road." After directing the commissioners to contract with fit persons for managing the lotteries, and to take bonds for the faithful performance of their duties, they are ordered to "pay over to the President and Directors of the said Fauquier *and Alexandria Turnpike Road [*165 Company," the money raised by said lotteries, "to be by them appropriated in the improvement and repair of said road."

Two of the commissioners appointed by this act declined acting under it, and nothing was done under the license or authority granted therein during the five years which intervened between that time and the passage of the act of the 25th of February, 1834, for the suppression of lotteries.

This act prohibits, under severe penalties, all lotteries and sale of lottery-tickets after the first day of January, 1837, with these provisos:—1st. "That nothing herein contained shall be construed to extend to or interfere with *contracts already made* for the drawing of any lotteries, the drawing whereof, by the provisions of such contracts, shall extend to a period beyond said first day of January, 1837;" and 2d. "That nothing herein contained shall be construed to extend to or interfere with any contract which may hereafter be made under or by virtue of any existing law authorizing the same, for the drawing of any lottery, the drawing whereof shall not extend beyond the first day of January, 1840."

A few days after the passage of this act, on the 11th of March, 1834, an act was passed appointing two commissioners in place of those who had declined, "to carry into effect the act of 30th of January, 1829."

Nothing was done under these acts till the 19th of December, 1839, when the commissioners entered into a contract with the plaintiff in error and another, authorizing them to draw as many lotteries as they think proper, paying to the

commissioners the sum of $1,500 a year, with covenants to increase the consideration, provided the Legislature of Virginia should pass an act exempting these lotteries from the penalties of the act of February, 1834, or if this court should pronounce the act of 1834 unconstitutional.

It is by virtue of this contract with the commissioners, that the plaintiff in error claims immunity; contending, "that the act of 1829 confers a valuable right or franchise on an existing corporation, without limitation of time; that it is a contract; and that the act of 1834 has attempted to limit and curtail the previous grant, and injuriously to abridge it, and is therefore void, as impairing the obligation of a contract."

The case was argued by *Mr. Z. Collins Lee*, for the plaintiff in error, no counsel appearing for the defendant.

The points made by him were the following:

That this court has jurisdiction on this writ of error, *166] because *the decision in the General Court involved the construction of a clause in the Constitution, and the decision was against the title or right specially set up or claimed under such clause of the Constitution.

That the act of 1829 (sec. 10) confers a valuable right or franchise on an existing corporation, to wit, the Fauquier and Alexandria Turnpike Company, duly incorporated by the act of Virginia.

This grant of the right to raise the sum of $30,000 is unconditional, and without limitation of time, requiring only the action of the commissioners; and the law contemplated on its face the raising of the money by lotteries, from time to time, and confers the power on the commissioners to make just such contracts as they think proper. The legislature, in its sovereignty, could do this. 4 Gill & J. (Md.), 150.

The state had no power to revoke this grant, because,—

1. It is presumed to be accepted by the turnpike company, without proof. 12 Wheat., 70–72; Angell & A. Corp., 89, &c.

2. Special verdict shows, that the law passed on petition of the president and directors; and, moreover, that, relying on the terms of this grant, the company did, prior to the 25th of February, 1834, enter into contracts, and incur debts, to be paid out of this lottery. This vested an interest in the corporation. 11 Gill & J. (Md.), 504.

3. The state is as much bound by her contracts, express or implied, as an individual. 4 Pet., 560; 4 Gill & J. (Md.), 128; 9 Id., 404, 405; 6 Cranch, 128. That this law of 1829 is a contract, see also 9 Cranch, 49; 2 Hayw. (N. C.), 310; 1 Murph. (N. C.), 58; 11 Pet.; 9 Gill & J. (Md.), 408.

4. The act of 25th February, 1834, impairs the rights vested under the previous contract.

The second proviso in this act excepts all contracts thereafter made, by virtue of any existing law for the drawing of lotteries, not extending beyond the 1st of January, 1840. See *Green* v. *Biddle*, 8 Wheat., 1; 3 Wash., 319.

Yet if the contract under which this lottery was drawn be duly authorized, in all its terms and duration, by the act of 1829, then the act of 1834 has attempted to limit and curtail the previous grant, and injuriously to abridge it.

But the act of 11th March, 1834, appointed two commissioners in place of those who had resigned, and therefore there could be no drawing until the vacancies were filled under the act of 1829.

Hence the law of 11th March, 1834, which is subsequent *to the penal law of 25th February, 1834, [*167 appoints two commissioners to fill the vacancies and to carry the law of 1829 into effect; thus furnishing a legislative declaration, that the act of 1829 was to be carried into effect. But the law of February, 1834, only allows time to carry the act of 1829 into effect until the first day of January, 1837.

5. The contract was made in a reasonable time after the act of 11th March, 1834, and was duly authorized by law in all its terms and duration; and the penalty sought to be enforced under the act of February, 1834, (which directly prohibits *all lotteries* after the 1st of January, 1840,) is not to be enforced, because it would violate the antecedent contract, made by the state in 1829.

Mr. Justice GRIER delivered the opinion of the court.

It might admit of some doubt whether the act of 1829 grants any franchise, or constitutes any contract, either with the commissioners therein appointed, or with the turnpike corporation. It imposes certain duties on each. The commissioners are required to use the license thus given, not for their own benefit, but for a public purpose. The money procured by the proposed lotteries is to be paid over to the Fauquier and Alexandria Turnpike Road Company, to be by them expended "in the improvement and repair of the road."

It is true, that the corporation might receive greater benefits from the repair of the road than the other citizens of the state; but the act imposed no duty on them as a previous consideration. They are not required to make any repairs till they receive the money.

But assuming that this would be too narrow a construction of this act, and that it conferred a privilege or benefit on the

corporation in the nature of a franchise or irrevocable contract, yet in its very nature it could not be considered illimitable as to time. On the contrary, the object for which the license was granted called for immediate action. "Three miles" of a great public thoroughfare are represented to be out of repair, and the company without immediate means to effect it. The sum to be raised being fixed and finite, and the subject of its application demanding immediate attention, the time within which the license is given cannot claim to be unlimited. And yet the commissioners and corporation have suffered eleven years to pass, before any attempt is made to perform the duty imposed on them, or avail themselves of the license or franchise conferred, and now claim a further term of twenty years, to raise the money and repair the road.

*168] *When the legislature of Virginia passed this most salutary act for the suppression of lotteries, they, with commendable caution, protected all vested rights. And notwithstanding the neglect to perform the duties imposed by the act of 1829, the act of 1834 does not revoke the grant or annul the license, but limits the time to six years within which the duties must be performed and the privilege exercised.

It has been often decided by this court, that the prohibition of the Constitution now under consideration by which state legislatures are restrained from passing any "law impairing the obligation of contracts," does not extend to all legislation about contracts. They may pass recording acts, by which an elder grantee shall be postponed to a younger, if the prior deed be not recorded within a limited time; and this, whether the deed be dated before or after the act. Acts of limitation also, giving peace and confidence to the actual possessor of the soil, and refusing the aid of courts of justice in the enforcement of contracts, after a certain time, have received the sanction of this court. Such acts may be said to effect a complete divesture, or even transfer, of right, yet, as reasons of sound policy have led to their adoption, their validity cannot be questioned.

What is the act under consideration, but a limitation of the time within which a certain privilege or license, limited in its very nature and purpose, may be exercised? If reasons of sound policy justify legislative interference with contracts of individuals, how much more will it justify the limitation of licenses so injurious to public morals.

The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the

wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.[1]

It is a principle of the common law, that the king cannot sanction a nuisance. But, without asserting that a legislative license to raise money by lotteries cannot have the sanctity of a franchise or contract in its nature irrevocable, it cannot be denied that the limitation of such a license as the present is as much demanded by public policy, as other acts of limitation which have received the sanction of this court.

There is, also, another view of this case, which concludes *the plaintiff in error from the benefit of a [*169 defence under this clause of the Constitution, even if it were tenable. The act of 1829 had become obsolete by non-user. Without further legislation, the license granted by it could not be exercised. The plaintiff in error cannot claim a right to sell lottery-tickets without invoking the aid of the act of 11th March, 1834, passed a few days after the "act suppressing lotteries." The courts of Virginia have very properly decided, that "this dormant right to draw the lottery which was revived by the act of March, 1834, must be taken as subordinate to and limited by, the act of the 25th of the previous month; that those statutes must be taken *in pari materia*, and receive the same construction as if embodied in one act; that there is nothing repugnant in the provisions of the one to those of the other, where the first is taken as limiting the time within which the right under the second is to be exercised."

This construction of their statutes by the courts of Virginia is not only just and correct, but is conclusive on this court and on the case, as it estops the plaintiff in error from averring against the constitutionality of the limitation under which he claims his privilege.

The judgment of the General Court of Virginia is, therefore, affirmed, with costs.

Order.

This cause came on to be heard on the transcript of the record from the General Court of Virginia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said

[1] QUOTED. *Stone* v. *Mississippi*, 11 Otto, 818.

General Court of Virginia in this cause be, and the same is hereby, affirmed, with costs.

*170] *THOMAS H. MCCLANAHAN, ADMINISTRATOR OF WILLIAM J. MCCLANAHAN, DECEASED, COMPLAINANT AND APPELLANT, *v.* RICHARD DAVIS, WILLIAM D. NUTT, ADMINISTRATOR OF GEORGE COLEMAN, DECEASED, ELIZABETH BLACKLOCK, THE WIDOW AND RELICT OF NICHOLAS F. BLACKLOCK, DECEASED, NICHOLAS F. BLACKLOCK THE YOUNGER, JANE LOWE, LATE JANE BLACKLOCK, DAVID LOWE, HER HUSBAND, AND ELIZABETH FOX, LATE ELIZABETH BLACKLOCK, THE SAID NICHOLAS F. THE YOUNGER, JANE, AND ELIZABETH BEING THE CHILDREN OF THE LATE NICHOLAS F. BLACKLOCK THE ELDER, DECEASED, DEFENDANTS.

The assent of an executor must be obtained before a legatee can take possession of a legacy. But this assent may be implied, and an assent to the interest of the tenant for life in a chattel inures to vest the interest of the remainder. Therefore, where a bill averred the possession of the subject of the legacy by the life-tenant in pursuance of the bequest in the will, and this bill was demurred to, it is sufficient to raise a presumption that the possession was taken with the assent of the executor.[1]

By the laws of Virginia, where there is a tenancy for life in a slave, with remainder to the wife of another person, the interest of the husband in the wife's remainder is placed upon the footing of an interest in a chose in action. If, therefore, he survives the wife, he may reduce the property into possession at the expiration of the life estate; but if he be dead at such expiration, the property survives to the wife, and on her death passes to her legal representative as part of her assets.

Query, whether the husband or his personal representative is not bound to administer upon the wife's estate, before bringing suit to recover property so situated in the state of Virginia.

Where there was no direct or positive averment that the defendants, or either of them, had any interest in the property claimed, or that it was in their possession, no ground of relief against those parties was shown, and the right to a discovery as incidental thereto, failed also.[2]

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, and sitting as a court of equity.

The object of the bill was to reclaim the possession of cer-

[1] Where the property bequeathed is allowed to pass into the possession of the legatee, and remain in his possession for a long time, the presumption of assent will attach. *Whorton* v. *Morange*, 62 Ala., 201; and such assent cannot be arbitrarily revoked. *Eberstein* v. *Camp*, 37 Mich., 176.

[2] S. P. *Hurst* v. *Hurst*, 2 Wash. C. C., 127.

tain slaves, and to compel an account and compensation for the value of certain other slaves, all of which were alleged to be the property of the complainant and appellant, in his character of administrator.

The facts were these:

In 1797, one Elizabeth Edwards, an inhabitant of Northumberland county and state of Virginia, by her last will and testament, bequeathed to her daughter, Sarah Nutt, a certain negro girl named Lavinia, a slave for life, with her future increase, for and during the life of said Sarah Nutt, and at her death to Elizabeth Fauntleroy Nutt, the granddaughter of the testatrix.

In the same year, viz., 1797, the testatrix died, and in June, 1797, the will was duly proved at the court of monthly session, and letters testamentary granted to Griffin Edwards, one of the executors named in the will.

*At some period of time after the death of the testatrix, the record did not show when, Sarah Nutt, the [*171 daughter, removed the girl Lavinia from the county of Northumberland to Alexandria, in the District of Columbia, and there sold her to one Nicholas F. Blacklock. After such sale, Lavinia had a numerous family of children and grandchildren.

Elizabeth Fauntleroy Nutt, the granddaughter of the testatrix, intermarried with William J. McClanahan, and died, leaving one child, an infant, who survived its mother but a short time. William J. McClanahan also died after his wife and child, but before Sarah Nutt, without having reduced any of the said slaves into his possession. After his death, the complainant administered upon his estate. The order in which the parties died was according to the following numbers:—

ELIZABETH EDWARDS (1)
|
SARAH NUTT (5)
|
WM. J. McCLANAHAN (4)—ELIZABETH FAUNT. NUTT (2)
|
DAUGHTER (3)

Sarah Nutt, the last survivor of the five, died in 1840, and after her death Thomas H. McClanahan took out letters of administration upon the personal estate of William J. McClanahan, and also upon the personal estate of Elizabeth F. McClanahan, his wife; both letters being taken out from Northumberland County Court in the state of Virginia.

In April, 1845, the administrator filed his bill against all the representatives of Nicholas F. Blacklock, who was dead and also against all those persons who were alleged to have

purchased any of the slaves. The bill recited the above facts, and averred, that, after the decease of the tenant for life, the rightful ownership of the slaves passed to William J. McClanahan, notwithstanding he never had the slaves aforesaid in his possession, by virtue of his intermarriage with, and survivorship of, his said wife and infant daughter, and only child, by the said Elizabeth, his aforesaid wife, according to the form and effect of the statute in such case made and provided, entitled "An act to reduce into one the several acts directing the course of descents," passed the 8th of December, 1792. The said life estate having ceased and determined, as your orator avers, on the day of , 1840, by the death of the said Sarah Nutt, and that your orator, as the administrator of the said William J. McClanahan, deceased, now has good right and title to sue for the recovery and possession of the said Lavinia, and her children and grandchildren, no right of action having accrued until after the death of the said Sarah Nutt.

*172] *The bill then prayed for a discovery of the number of slaves, in whose possession they were, and for an account of the value of their services, &c., &c.

In October, 1845, the defendants filed the following demurrer to the bill:

"These defendants, respectfully, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show;—

"1st. That the said complainant hath not, in and by said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is sought and prayed for, from and against these defendants.

"2d. That the said complainant hath not, as appears by his said bill, made out any title to the relief thereby prayed.

"3d. That the said complainant, by his own showing in said bill, is not entitled to the discovery and relief therein prayed, but is barred therefrom by lapse of time, and the statute of limitation, in such cases made and provided. Wherefore, and for divers other errors and imperfections, these defendants humbly demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray hence to be dismissed with their reasonable costs in this behalf expended.

"FRANCIS L. SMITH, *Solicitor for Defendants.*"

In May, 1846, the cause came up for argument, when the court sustained the demurrer and dismissed the bill.

The complainant appealed to this court.

The cause was argued by *Mr. Neale*, for the appellant, and *Mr. Francis L. Smith*, for the appellees.

Mr. Neale, for the appellant, in reply to the first cause assigned for demurrer in the appellees' printed brief, argued, that notice could not have been given the purchasers of the slave Lavinia and her offspring, because those in remainder were kept in profound ignorance of the sale by the life-tenant, until after her death, which happened in the year 1840;—and as to its operating a fraud on the purchasers, he was at a loss to imagine how a charge so foul could be imputed to the appellant, or those whose interests he represented. He thought that the late Sarah Nutt, the life-tenant, was alone properly obnoxious to the imputation of fraud, for that she, and she only, *was concerned in the transaction [*173 That she was entirely regardless of her mother's last solemn bequest, and equally reckless of her own child's legitimate rights; and he asked, was this a "mother's love,"—which, in the beautiful language of poetry, is said to be a "living fountain of undying waters." So far from it, he contended, that the mean and detestable passion of avarice, which converted all the noble and generous feelings of our nature into the meaner passions of the soul, at once, in this case, quenched and dried up forever the holy fountain, which otherwise would have been, as it should be, a perennial stream.

And in regard "to the general policy of the laws of Virginia, in protecting *bonâ fide* purchasers of personal property without notice,"—as reported in 5 Leigh (Va.), 520,—he denies that it applied to the case then under consideration, reminded the opposite counsel of the maxim, *caveat emptor*, and argued, that, while the law had been fully complied with as regarded the will of Elizabeth Edwards, not so as regarded the mortgage mentioned and reported in 5 Leigh (Va.), and that the two cases were entirely dissimilar, and then proceeded to show it by comparing them.

To the second cause of demurrer he insisted, that "every preliminary act necessary to make the plaintiff's title complete" was to be found in the bill. And to the objection, that the bill did not aver the assent of the executor of Elizabeth Edwards, who died in the year 1797, and that, without such assent being averred, an action of detinue could not be sustained, he contended, that the possession of the slave Lavinia.

from the time of the death of the testatrix in the year 1797 by the life-tenant, until her death in 1840, was sufficient presumptive evidence at least of such assent, but at the same time he argued that no such averment was necessary in a chancery suit, but admitted that such assent was necessary, and should be averred, in a court of law. He also contended, that the title to the slaves in remainder vested in Elizabeth F. Nutt at the death of Elizabeth Edwards, and that it also vested in the appellant's intestate, upon his intermarriage with the said Elizabeth F. Nutt; that the possession of the life-tenant was the possession of those in remainder; that the same remark applies with equal propriety to the purchasers, who by the purchase acquired no greater title than Sarah Nutt took under the will of her mother, Elizabeth Edwards; that it was, in technical language, a *possessio fratris;* that William J. McClanahan took by operation of law,—had a constructive possession,—and that no administration was
*174] necessary on the personal estate of Elizabeth F. McClanahan *either by her late husband when living, or by the appellant, who is his administrator. But even assuming *arguendo*, that such administration was necessary, and under it a recovery of the slaves had been effected, in that event her administrator would have recovered and held the slaves, as trustee, for the administrator of William J. McClanahan or his next of kin, which might have caused circuity of suits, or actions, to prevent which is one of the heads of equity jurisdiction. O. R. Code, p. 168, sec. 8; Id., p. 164, sec. 27; 1 Tucker's Bl. Com., book 2, p. 318; 1 Munf. (Va.), 98.

He also submitted, that, if the infant child, under the statute of distribution, succeeded to the property of the mother, if the father, under the third section of the statute of descents, was not the heir of his infant child.

To the plea of the statute of limitations, he relied on the savings of non-residence in said statute as conclusive in favor of the appellant. O. R. Code, p. 107, § 4; Id., p. 109, § 12; Laws of United States, old edition, p. 268, § 1.

And in reply to the forfeiture, for the removal out of the state of the slaves in question, he contended that it applied only to dower slaves, and not to legacies. O. R. Code, p. 191, § 44.

Mr. Francis L. Smith, for the defendants, contended, under the first ground of demurrer, that the plaintiff had not showed himself to be entitled to any relief.

The allegations of the bill are vague and indefinite throughout. There is no distinct and express averment that the

defendants, or either of them, claim or are possessed of the negro woman Lavinia, or her offspring.

The nearest approach to an express charge is in reference to Betsey, but the bill does not expressly aver that she is either claimed or possessed by Davis or Nutt; it is said that she and the children whom she is said to have had, since her sale to Coleman, are in possession of either the one or the other.

There is still more uncertainty as to the other slaves; even Lavinia is not averred to be claimed by either of the defendants, or to be in their possession. But she and her daughter Maria are charged as hiring themselves about the town of Alexandria, and as accounting for their hires with the family of Nicholas F. Blacklock, deceased.

The bill is too loose and uncertain to require any specific answer. The allegations should have been direct and positive, both as to facts and parties. Story Eq. Pl., ed. 1840, §§ 244 to 251, inclusive; also § 510.

*The case made by the bill should have traced the plaintiff's title, and shown his right to recover, with as much certainty as to the substantial facts, as pleadings at law. *East India Co.* v. *Henchman*, 1 Ves., 287; Mitf. Pl., 150; *Ryves* v. *Ryves*, 3 Ves., 343; *McGregor* v. *East India Co.*, 2 Sim., 432; *Hardman* v. *Elames*, 5 Id., 640; S. C., 2 Myl. & K., 732; *Walburn* v. *Ingsby*, 1 Id., 177; *Jerrard* v. *Saunders*, 2 Ves., 186; *Mechanics' Bank* v. *Levy*, 3 Paige (N. Y.), 606. [*175

There must be an actual, not a pretended, necessity for a discovery, presented by a full statement of the case, and not by general averments. *Meze* v. *Mayse*, 6 Rand. (Va.), 660; *Webster* v. *Couch*, 6 Id., 524; *Russell* v. *Clarke's Executor*, 7 Cranch, 69, 89.

A defect in the charging part of a bill cannot be supplied by a subsequent interrogatory. *Parker* v. *Carter*, 4 Munf., 273. Whilst it is admitted, on behalf of the defendants, that there may be cases in which a court of equity can properly entertain jurisdiction for the recovery of slaves, yet they insist that this case does not fall within the rule.

The plaintiff's remedy was in a court of common law. *Armstrong* v. *Huntons*, 1 Rob. (Va.), 323; *Wright* v. *Wright*, 2 Litt. (Ky.), 8; *Bass* v. *Bass*, 4 Hen. & M. (Va.), 478 *Joyce* v. *Grinnals*, 2 Rich. (S. C.) Eq., 259; *Parks* v. *Rucker* 5 Leigh (Va.), 149.

This is an effort to recover the slave Lavinia and her increase from *bonâ fide* purchasers, holding under Blacklock; the parties in remainder, having failed to give notice of their claim to the slave Lavinia or her increase, which would operate a fraud on such purchasers.

As to the general policy of the laws of Virginia, in protecting *bonâ fide* purchases of personal property, without notice, see *Lane* v. *Mason*, 5 Leigh (Va.), 520.

The second cause of demurrer is, that the plaintiff has not made out any title in himself to the discovery and relief prayed.

Every preliminary act necessary to make the plaintiff's title complete should be averred in the bill, and the mere allegation that his title is complete is not sufficient. 1 Dan. Ch. Pr., mar. page 422, and cases there cited.

Before the title to the slave Lavinia could, under the will of Elizabeth Edwards, be complete in Sarah Nutt or Elizabeth Fauntleroy Nutt, it is indispensable that the assent of the executors to the legacy should have been obtained, and so alleged in the bill. There is no such averment.

See 2 Lomax on Executors and Administrators, § 3, pp. 128 and 129, and cases there referred to, declaring that a *176] legatee of a slave cannot, if the assent of the executor has not been obtained *to the legacy, maintain an action of detinue against one who unlawfully holds possession of the slave; nor will the assent in such case be dispensed with, though no one has taken out probate or letters of administration. *Sutton* v. *Crain*, 10 Gill & J. (Md.), 458; *Woodyard* v. *Threlkeld*, 1 Marsh. (Ky.), 10, 11; *Hairston* v. *Hall*, 3 Call (Va.), top page 188, side page 219.

But is the title to the slaves in the plaintiff? He must recover, if at all, either because William J. McClanahan, by virtue of his marital rights, during the coverture reduced the slaves into possession, or from his having obtained letters of administration on his wife's estate, not being compelled to make distribution. The bill expressly negatives the first, and is silent as to the second ground. There being no averment that he so administered, we have a right to assume in this argument that he did not.

How else, then, can the plaintiff claim title to the slaves, in his character as administrator of William J. McClanahan?

If there be any outstanding valid title, legal or equitable, as against the defendants, it must be in the personal representative, or next of kin, of the deceased wife, Elizabeth Fauntleroy McClanahan, and if so, the plaintiff cannot maintain this suit. 2 Bl. Com., ed. 1847, p. 433; *Wallace* v. *Taliaferro*, 2 Call (Va.), 447; *Upshaw* v. *Upshaw*, 2 Hen. & Munf. (Va.), 381.

Thirdly, the discovery and relief prayed for are barred by lapse of time and the statute of limitations.

Both of these grounds of defence may be taken advantage

of by demurrer. *Wisner* v. *Barnet et al.*, 4 Wash. C. C., 638, 639, and cases there cited; *Humbert* v. *The Rector of Trinity Church*, 7 Paige (N. Y.), 195; *Dunlap* v. *Gibbs*, 4 Yerg. (Tenn.), 94.

The limitation to an action of detinue in Alexandria is five years. See Old Revised Code, ed. 1803, p. 107. And it is the settled doctrine in Virginia, that the adverse possession of a slave for that period, acquired without force or fraud, confers absolute title. *Newby's Adm'rs* v. *Blakey*, 3 Hen. & Munf. (Va.), 57; *Taylor* v. *Beal*, 4 Gratt. (Va.), 93; *Ellmore* v. *Mills*, 1 Hayw. (N. C.), 412; *Halsey's Adm'r* v. *Buckley*, 2 Id., 234; *Orr et al.* v. *Pickett et al.*, 3 J. J. Marsh. (Ky.), 268; *Kegler* v. *Miles*, Mart. & Y. (Tenn.), 426; *Shelby* v. *Guy*, 11 Wheat., 361; *Brent* v. *Chapman*, 5 Cranch, 358.

The statute of Virginia, 1 Revised Code, (ed. 1819,) p. 431, § 48, declares the estate of the life-tenant forfeited by a removal of slaves out of the state.

Assuming the removal to have occurred as stated in the bill, then the title to Lavinia was, by the forfeiture, immediately divested out of Sarah Nutt; and the party in remainder might forthwith have maintained detinue for the slave. [*177
Wilkins v. **Despard*, 5 T. R., 112; *Roberts* v. *Withered*, 5 Mod., 198; S. C., 12 Id., 92, and cases there cited. Also reported in 1 Salk., 225, by the name of *Roberts* v. *Wetherall*.

The statute of limitation, in case of a contingency, runs from the time the contingency happens. *Fenton* v. *Emblers*, 1 W. Bl., 354. So of usury,—it begins to run the instant the money is paid. 6 Bac. Abr. (Gwillim's ed., 1844), 372. And in actions for taking insufficient bail, from the return of *non est inventus* on the execution against the principal. Id., p. 373.

As soon as a trust ceases, action accrues, and the statute begins to run. *Green* v. *Johnson*, 3 Gill & J. (Md.), 389. Trover is barred after six years, though the plaintiff was ignorant of the conversion, the defendant not having committed any fraud to prevent the plaintiff's earlier knowledge. *Granger* v. *George*, 7 Dowl. & Ry., 729.

If an executor in trust for another neglects to bring his action within the time prescribed by the statute, the *cestui que trust* or residuary legatee will be barred. *Wych* v. *East India Co.*, 3 P. Wms., 309.

The statute runs in favor of disseisors and tortfeasors. *Harrison* v. *Harrison et al.*, 1 Call (Va.), top page 372, side page 428.

In all cases of concurrent jurisdiction at law and in equity, the statute of limitations is equally obligatory in each court. 2 Story Eq. Jur., §§ 1520 and 1520 *a*; 6 Bac. Abr., 385.

This is nothing more than an action of detinue in the form of a suit in equity.

The lapse of time, and gross laches of the parties claiming in remainder, should of itself be a complete defence to the claim.

The bill is multifarious. On this point it is only necessary to cite 1 Dan. Ch. Pr., pp. 438 to 451 inclusive, and the cases there cited.

NOTE.—Extract from 1 Revised Code of Virginia, (ed. 1819,) p. 431, § 48:—"If any person or persons possessed of a life estate in any slave or slaves shall remove, or voluntarily permit to be removed, out of this commonwealth such slave or slaves, or any of their increase, without the consent of him or her in reversion or remainder, such person or persons shall forfeit every such slave or slaves so removed, and the full value thereof, unto the person or persons that shall have the reversion or remainder thereof, any law, custom, or usage to the contrary notwithstanding."

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the Circuit Court of the District of Columbia, and County of Alexandria.

*178] *The bill was filed by the administrator of Thomas H. McClanahan against the defendants, to obtain possession of Lavinia, a slave, together with three children, Betsey, Polly, and Maria, and several grandchildren, which had been bequeathed by Elizabeth Edwards to Sarah Nutt, her daughter, for life, and after her decease to Elizabeth F. Nutt, a granddaughter, the wife of the complainant's intestate. Elizabeth, the granddaughter, died, leaving the intestate, her husband, surviving, who died also, leaving Sarah, the life-tenant, surviving. The latter died in 1840.

The complainant took out letters of administration on the estate of the husband, September 9, 1839, and afterwards upon the estate of Elizabeth, the wife, on the 9th of November, 1840, and filed this bill in April, 1845, claiming that the property and right to the possession of the slaves bequeathed to the wife in remainder became complete in him, as the representative of the estate of the husband, on the death of the life-tenant.

The defendants demurred to the bill, and several grounds of objection have been taken under the demurrer.

1. That there is no averment that the executors of Mrs. Edwards assented to the legacy to the granddaughter, so as to vest the property in the legatee, and enable the personal representative to bring the suit. *Hairston* v. *Hall*, 1 Call

(Va.), 188; *Smith and Wife* v. *Towne's Administrator*, 4 Munf. (Va.), 191.

The whole of the personal estate of the testator devolves upon the executor; and it is his duty to apply it, in the first place, to the payment of the debts of the deceased; and he is responsible to the creditors for the satisfaction of their demands to the extent of the whole estate, without regard to the testator's having, by the will, directed that a portion of it shall be applied to other purposes. Hence the necessity that the legatee, whether general or specific, and whether of chattels real or personal, must first obtain the executor's assent to the legacy before his title can become perfect. He has no authority to take possession of the legacy without such assent, although the testator by the will expressly direct that he shall do so; for, if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors. 2 Wms. on Exec., p. 843, ch. 4, § 8, and cases there cited.

But the law has prescribed no particular form by which the assent of the executor shall be given, and it may be, therefore, either express or implied. It may be inferred from indirect expressions or particular acts; and such constructive permission shall be equally available. An assent to the interest of the tenant for life in a chattel will inure to vest the interest of the *remainder, and *e converso*, as both constitute but one estate. So an assent to a bequest of a lease for years carries with it an assent to a condition or contingency annexed to it; and it may be implied from the possession of the subject bequeathed by the legatee for any considerable length of time. Id., p. 847, and cases. [*179

The bill, in this case, contains an averment of the possession of the subject of the legacy by the life-tenant, in pursuance of the bequest in the will, and which is admitted by the demurrer; and, upon the principles above stated, lays a sufficient foundation for the presumption, that the possession was taken with the assent of the executors,—a presumption of law from the facts admitted, and which assent inured to the benefit of the remainder-man. This ground of objection is not, therefore, well taken.

2. The next objection is, that the complainant has shown no title to the slaves in question, upon the face of the bill.

Because the interest in the remainder did not vest in the intestate, the husband, before his death, so as to make the property a part of the assets of his estate, to be administered upon by his personal representative. He survived Elizabeth, his wife, the legatee in remainder, but died before the life-

tenant, and therefore had not, and could not have, reduced the subject of the legacy into possession in his lifetime.

This question is to be determined upon the laws of the state of Virginia; and, on looking into the course of the decisions of the courts in that state, it will be found that the interest of the husband in the wife's remainder of this species of property is placed upon the footing of an interest in a chose in action of the wife, which vests in the husband, if he survives, subject to be reduced to possession by him, if living at the termination of the life estate, and if not, by his legal representative, as a part of his personal estate. *Dade* v. *Alexander*, 1 Wash. (Va.), 30; *Wallace et ux.* v. *Taliaferro et ux.*, 2 Call. (Va.), 447, 470, 471, 490; *Upshaw* v. *Upshaw et al.*, 2 Hen. & M. (Va.), 381, 389; *Hendren* v. *Colgin*, 4 Munf. (Va.), 231, 234, 235; *Wade* v. *Boxley*, *&c.*, 5 Leigh. (Va.), 442.

In a very early case in the Court of Appeals, *Dade* v. *Alexander*, decided in 1791, it was resolved, a feme sole being entitled to slaves in remainder or reversion, and afterwards marrying, and dying before the determination of the particular estate, the right vests in the husband. The president (Pendleton) stated, that this was the constant decision of the old General Court from the year 1653 to the Revolution, and has *180] since been confirmed in this court, in the cases of *Sneed* v. *Drummond*, *and *Hord* v. *Upshaw*, and that it had become a fixed and settled rule of property. The case of *Wade* v. *Boxley*, *&c.*, decided in 1834, affirmed the same principle. There the question was between the surviving husband and the children of the deceased wife, as to the slaves in remainder, the wife having died before the life-tenant. The court held the wife took a vested remainder in the slaves, which at her death devolved to her husband, and not to the children.

There is some question in the books whether the husband can bring a suit in his own name, or, in case of his death, a suit can be brought in the name of his personal representative, to reduce to possession this species of property after the termination of the life interest; or whether he or the personal representative, as the case may be, is not bound to take out letters of administration upon the estate of the wife, and bring the action as such administrator.

That the husband, and, in case of his death, his personal representative, are entitled to administration in preference to the next of kin to the wife, was expressly decided in the case of *Hendren* v. *Colgin*, already referred to.

In the case of *Chichester's Exec.* v. *Vass's Adm'r*, 1 Munf. (Va.), 98, Judge Tucker expressed the opinion, that, in equity,

letters of administration upon the estate of the wife were unnecessary; and he referred to several authorities in England, in support of the position, and especially the case of *Elliot* v. *Collier*, 3 Atk., 528; S. C., 1 Wils., 168; S. C., 1 Vern., 15. See also *Squib* v. *Wyn*, 1 P. Wms., 378, 380, 381; Harg., note to Co. Lit., 351; *Whitaker* v. *Whitaker*, 6 Johns. (N. Y.), 112, 117, 118.

The cases of *Dade* v. *Alexander*, *Robinson* v. *Brock*, *Drummond* v. *Sneed*, and *Wade* v. *Boxley*, *&c.*, already referred to, are cases in which the administration on the wife's estate seems to have been dispensed with.

The usual course, however, is to take out letters; though it is difficult to assign a reason for the requirement; except, perhaps, to give the creditors of the wife a remedy, as the surviving husband is liable for her debts in this representative character to the extent of her assets. (*Heard* v. *Stamford*, Cases Temp. Talb., 173; 3 P. Wms., 409; 2 Wms. on Exec., 1083, 1084; *Gregory* v. *Lockyer*, 6 Mad., 90.) These are limited to her personal estate, which continued in action, and unrecovered at her death. Beyond this he is not responsible, after her decease, no matter what may have been the estate received by her. (2 Wms. on Exec., 1084; Went. Off. Exec., 369; and cases before cited.)

In this case the complainant took out letters of [*181
administration *upon the estate of Elizabeth, the wife, which are referred to in the bill, as well as the letters upon the estate of the husband; but there is no averment of a claim to the possession of the slaves in that right, the claim being placed exclusively upon his right as administrator of the husband. The bill is, probably, defective for want of this averment; but as it is defective upon another ground, which we shall presently state, it is unnecessary to express a definitive opinion upon this one.

The will of Elizabeth Edwards bequeathed to Sarah Nutt, her daughter, the slave Lavinia, together with her future increase, during her life, and, at her death, to Elizabeth, the granddaughter, the wife of the intestate, and to her heirs for ever. And the daughter, before the termination of the life estate, and after the slave came into her possession, sold her to one Nicholas F. Blacklock, residing in the city of Alexandria, since deceased, leaving a widow and three children. These children and the husband of one of the daughters are made defendants, and also the husband of the only living child of George Coleman, who, it is charged, purchased Betsey, one of the children of Lavinia, and William D. Nutt, his administrator. These comprise all the defendants.

The bill prays that the defendants may be decreed to make restitution of the slave Lavinia, her children and grandchildren, and also to make compensation for the services of the same since the right of the intestate accrued; and, further, that they discover the numbers and names of the children and grandchildren, and the person or persons in whose possession they are, or who own or claim them, or either of them; and also various other facts and circumstances tending to establish the title of the complainant to Lavinia, and her increase, which it is not material further to notice.

The ground of objection upon the demurrer, in this part of the case, is, that there is no direct or positive averment in the bill that the defendants, or either of them, have any interest in the slaves in question, or that the slaves themselves are in their possession, or under their control, or in the possession or under the control of either of them; and which ground of objection, we are of opinion, is well taken, and fatal to the relief prayed for.

There is not only no direct averment of possession or control, but the contrary appears upon the face of the bill. It is charged that Lavinia and her daughter Maria reside in the town of Alexandria, and go out to service, accounting therefor to the family of Nicholas F. Blacklock, for and in behalf of the widow, who is not a party to the bill; that Polly and her children *reside in the city of Washington, with persons unknown; and that Betsey and her children are either in the actual possession of Richard Davis, the husband of the daughter of George Coleman, deceased, or under the control of William D. Nutt, his administrator.

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Possession is thus shown to be out of the defendants, with the exception of Betsey and her children, who are stated, as we have seen, to be either in the possession of Davis, or under the control of Nutt.

It is apparent, therefore, upon the face of the bill, that the complainant has set forth no title to relief against these defendants, or either of them, whatever may be the right which he has shown to the slaves themselves; as it is not averred that they or either of them have any interest in the slaves, the subject-matter of the suit, or that they are in any way liable to account to him for the same, or chargeable for their services.

The purchase of Lavinia, by Blacklock, of the life-tenant, was lawful, and vested in him the title and right to her service and increase, until the termination of that estate, in 1840. The sale by him of Betsey to Coleman was also lawful; and whether or not the others continued in the family and be-

longed to him at his decease, and passed to the widow and children, as part of his estate, is nowhere stated in the bill.

There is no averment that the children, who are made defendants, took any interest in them at his decease, as his heirs, next of kin, or legatees; and, as we have already stated, not even so much as possession. The only allegation in this respect is, "that, since the sale to Blacklock by Mrs. Nutt, the said Lavinia has had a numerous increase, to wit, children and grandchildren, most of whom have been sold, or otherwise disposed of, as your orator is informed, and believes; and that some of them are now going at large, or are in the possession of the family of the said Blacklock;" but in the possession of what members of the family, or whether in the possession of any of those who are made defendants, are matters left altogether to conjecture and surmise.

The same vagueness and uncertainty exist in respect to the charges against the other defendants.

There is no averment that Betsey and her children belonged to Coleman at his decease, and passed to his widow and children, or that they had any interest in the same, the only allegation, in this respect, being, that they are said to be in the possession of Davis, the son-in-law, or under the control of Nutt, the administrator.

The radical vice in the bill is, that no case is made [*183 out *against these defendants, or either of them,—no foundation laid creating a liability, legal or equitable, to deliver the slaves to the complainant, or to account for their value or services; they seem to have been made parties, one and all, as witnesses to establish a supposed right of the intestate to the property, under the idea that, from their connection with the families of the former owners of the life interest, they might be able to give some information on the subject. (Story's Eq. Pl., §§ 234, 244, 245, 510, 519; Cooper's Pl., 41, 42; 2 Johns. Ch., 413.)

There are other objections taken to the relief sought in this form, which are worthy of consideration; but as the ground above stated disposes of the case, it is not important that we should examine them.

The complainant having, in our judgment, failed to set forth any foundation for relief, the right to the discovery, which is claimed as incidental, of course fails with it. (Story's Eq. Pl., § 312 and note; 17 Maine, 404; 3 Edw., 107; 3 Beav., 284.)

The decree below must be affirmed.

Order.

This cause came on to be heard on the transcript of the

record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

CHARLOTTE TAYLOR, BY JAMES M. WALKER, HER NEXT FRIEND, APPELLANT, *v.* JAMES TAYLOR, JULIA SCARBOROUGH, GODFREY BARNSLEY AND JULIA, HIS WIFE, JOSEPH SCARBOROUGH AND WILLIAM SCARBOROUGH, ROBERT M. GOODWIN, NORMAN WALLACE, AND ANDREW T. MILLER.

A deed from a female child, just of age, and living with her parents, made to a trustee for the benefit of one of those parents, founded on no real consideration, executed under the influence of misrepresentation by the parents, and containing in its preamble a recital of false statements, ordered to be set aside, and the property reconveyed to the grantor.[1]

The principles upon which a court of equity interferes to protect persons from undue and improper influences examined and stated.

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[1] A deed will not be set aside on the ground of fraud, unless it be proved beyond a reasonable doubt. *Phettiplace* v. *Sayles*, 4 Mason, 312.

A deed to a parent, by a child just come of age, is *prima facie* valid, and the burden of proving undue influence or fraud, is on the party attacking it. *Sullivan* v. *Sullivan*, 21 Law Rep., 531; *Reehling* v. *Byers*, 94 Pa. St., 316.

In *Hallett* v. *Collins*, 10 How., 174, releases obtained for an inadequate consideration, from heirs just come of age, who were poor and ignorant of their rights, were set aside.

In *Miller* v. *Simonds*, 5 Mo. App., 33, a gift of valuable property was made by a motherless girl of twenty-three, to her father who had been her guardian. The court set aside the deed, treating her legal term of disability as extended, on proof that her habits of submission to her father remained unchanged.

In *Thornton* v. *Ogden*, 3 Vr. (N. J.), 228, a conveyance by an unmarried woman to her brother, with whom she resided, executed in the confidence that the brother would deal justly with her, was set aside for great inadequacy of consideration.

In the recent English case of *Kempson* v. *Ashbee*, L. R. 10, Ch. Cas. 15, two bonds issued by a young woman, living at the time with her mother and step-father—one, at the age of twenty-one, as surety for her step-father's debt, and the other, at the age of twenty-nine, to secure the amount of a judgment recovered on the first bond,—were set aside as against her, on the ground that she had acted in the transaction without independent advice; one of the justices observing that the court had endeavored to prevent persons subject to influence from being induced to enter into transactions without advice of that kind. S. P. *Davis* v. *Dunne*, 46 Iowa, 684; *Rankin* v. *Patton*, 65 Mo., 378; *Miller* v. *Simonds*, 72 Mo., 669.

Taylor v. Taylor et al.

THIS was an appeal from the Circuit Court of the United States for the District of Georgia, sitting as a court of equity.

*The bill was filed in the Circuit Court by Charlotte [*184
Taylor, formerly Charlotte Scarborough, a resident of the state of New Jersey, to set aside a deed which she alleged had been obtained from her in an illegal and fraudulent manner. The defendants were James Taylor, her husband, some of the members of her family, Robert M. Goodwin, who had become the trustee under the deed after the death of William Taylor, the original trustee, and Wallace and Miller, who were the executors of William Taylor, the original trustee.

Prior to the year 1819, William Scarborough, a merchant residing in Savannah, became embarrassed in his affairs, and on the 5th of June in that year executed a mortgage for the purpose of securing his indorsers upon certain notes; the indorsers being Andrew Low and Company, and William Taylor. The firm of Andrew Low and Company was composed of Andrew Low, Robert Isaac (who had married William Scarborough's sister), and James McHenry.

The property mortgaged consisted of certain stocks and real estate, amongst which was the following lot:—"All that lot of land, and the buildings and improvements thereon, situated, lying, and being in the city of Savannah aforesaid, bounded on the east by West Broad street, on the south by a street or lane thirty feet wide, and on the west and south by the lots contiguous to the same, containing ninety feet in front, and being the lot and buildings opposite Mr. Daniel Hotchkiss, and recently erected by the said William Scarborough."

On the next day, namely, the 6th of June, 1819, Scarborough confessed a judgment in favor of Andrew Low for $87,584.50.

On the 13th of May, 1820, Scarborough executed a deed in fee simple of the above-described property to Robert Isaac.

On the 16th of November, 1820, Scarborough was discharged as an insolvent debtor by the Chatham County Inferior Court.

On the 2d of January, 1825, a sale of Scarborough's furniture took place by the marshal, under an execution which had been issued by virtue of a judgment obtained against him by Andrew Low. The property was all purchased by Isaac, according to the following schedule. It is inserted here for the purpose of being compared with the inventory [*185
which was taken of Isaac's property after his *death, and which will be stated in its proper place.

ANDREW LOW *v.* WILLIAM SCARBOROUGH.—*Marshal's Sales.*

Purchaser.		*Tuesday, 2d January,* 1825.
R. Isaac, Esq.	To furniture in room No. 1 (dining),	$500.00
	" passage, No. 2 .	200.00
	" dining-room, No. 3, .	500.00
	" larger do. No. 4, .	350.00
	" up-stairs passage, 5, clock	
	" and lamp, . .	60.00
	" bed-room, No. 1, .	110.00
	" " No. 2, .	100.00
	" " No. 3, .	60.00
	" " No. 4, .	75.00
	" " No. 5, .	30.00
	kitchen furniture, . . .	25.00
	silver ware, ...	400.00
	carriage and gig, ...	250.00
	pair carriage horses, . . .	200.00
	saddle horse, ...	80.00
		$2,940.00

In February, 1826, an agreement was made amongst the partners constituting the firm of A. Low and Company, by which the house and lot, which had been mortgaged to the firm, and afterwards conveyed to Isaac, was to be held as the separate and individual property of Isaac, upon his paying to the firm the sum of $20,000.

On the 26th of August, 1827, Isaac made his will, which contained the following clause:—

"Seventh. Item, I give and bequeathe unto my beloved niece, Charlotte Scarborough, all my right, title, and interest in and to the lot, dwelling-house, and all other improvements thereon, which formerly belonged to her father, William Scarborough, on West Broad street, in the city of Savannah, known in the plan of said city as lot No. , together also with the plate, furniture of all kinds, books and prints, all which were purchased and paid for at marshal's sales by me."

On the 16th of October, 1827, Isaac died.

Eight persons were named in the will as executors, but only three acted, viz., William Scarborough, William Taylor, and Norman Wallace, to whom letters testamentary were granted on the 17th of January, 1828.

On the 9th of January, 1828, the will was proved, and on the
*186] next day, viz., the 10th, Charlotte Scarborough, the niece *and devisee of the deceased, addressed the following letter to her father, William Scarborough.

"MY EVER-HONORED FATHER,—From a sense of my unworthiness, I am convinced that the love my dear uncle bore me, and which dictated his bequest to me in his last will, would not, could he now see my conduct, condemn me for pursuing the feelings of a heart strongly and sincerely devoted in affection to the members of my family. Having arrived at an age when I may with impunity legally make a transfer of that which has been so generously placed at my discretion, I unhesitatingly follow this course of conduct, unbiased by any control whatsoever; and in the liberty I am now using, I am acting by my own free will, dictated by my feelings alone, and unknown to any person. Thus, then, I most emphatically transfer all my right to the said property (the gift of my ever-lamented uncle) to my beloved mother, to be used and enjoyed as her unquestionable right, during her lifetime; and at her death and yours, to be equally divided between my sisters, brothers, and myself, my right operating in no manner in my favor to the exclusion of the other members of our family.

"In thus making a transfer of the said property, I trust my much-loved parent will acknowledge *one* slight proof of my gratitude for all his numerous kindnesses lavished on me. Most thankful do I feel for being made the simple instrument of accomplishing the will of him who has so kindly and generously placed his confidence in me; and in acting thus, convince the world that my devoted affection for him was pure, disinterested, and unbiased by any future expectation.

"I am, dear Sir, your most affectionate and grateful daughter, CHARLOTTE D. SCARBOROUGH.

"*Savannah, January 10th*, 1828."

On the 22d of January, 1828, Charlotte executed the deed which it was the object of the present suit to set aside. It recited a proposed marriage settlement of 1805, and then proceeded as follows:—

"And whereas, from neglect, the said deed was not recorded in Chatham county and state of Georgia, and whereas, in the year 1819, the said William Scarborough having failed in trade, and some doubts having been suggested as to the validity of the said marriage settlement, from the omission to record the same as aforesaid, the said William Scarborough did, in consequence of such doubt, transfer and convey all his right, title, and interest, if any remained to him, in and to the aforesaid named and described lots of land, to his principal creditor, *Robert Isaac, of Savannah, his heirs and [*187 assigns, in part satisfaction of his debt; and whereas the said Robert Isaac hath recently departed this life, leaving a last

will and testament, whereby he bequeathed and devised to the said Charlotte Scarborough, his niece, all his right, title, and interest in the said lots of land, the dwelling-house and improvements thereon, together with the plate, furniture of all kinds, books and prints, therein, which were purchased by the said Robert at marshal's sales, in the city of Savannah, which said last will and testament has been duly proved before the Court of Ordinary of Chatham County; and whereas the said Charlotte Scarborough, to whom the aforesaid devise was made, being of lawful age, and being desirous of conveying or carrying the said marriage settlement into effect, according to the original intention of the parties thereto, hath determined to convey all her right, title, and interest in said property in trust for that purpose. Now, this indenture witnesseth, that the said Charlotte, in consideration of the premises, and from natural love and affection for her said beloved mother, Julia Scarborough, and her sisters and brothers, and also in consideration of the sum of one dollar, to her in hand paid by the said William Taylor of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, released, conveyed, and confirmed, and by these presents doth grant, bargain, and sell, release, convey, and confirm, unto the said William Taylor, his heirs and assigns, all her right, title, and interest in and to the said lots of land herein before described and set forth, together with the buildings and improvements thereon, with the appurtenances, and together with the plate, furniture of all kinds, books and prints, herein before referred to; which lots, buildings, improvements, furniture, plate, books and prints, were devised to her by the said Robert Isaac, as herein before set forth. To have and to hold the said lots of land, with the other premises and appurtenances, unto him, the said William Taylor, his heirs and assigns; in trust, nevertheless, to and for the use of the said Julia Scarborough, wife of the said William Scarborough, for and during the term of her natural life, not to be in any manner, or by any means, subject to, or liable for, the debts of the said William Scarborough, her said husband; and from and after the decease of the said Julia Scarborough, then in further trust to and for the use and benefit of the said Charlotte Scarborough, and such of her brothers and sisters, children of the said Julia, as shall be living at the time of the decease of the said Julia Scarborough, equally to be divided between them, share and share alike."

*188] The deed then contained a covenant for further assurances, *and was executed in presence of Andrew Low and John Guilmartin.

On the 25th of January, 1828, Scarborough, as a qualified executor of the estate of Isaac, exhibited an inventory to the court, from which the following is an extract:

"In the house formerly the property of Wm. Scarborough, and bought by Robert Isaac at marshal's sales, as per his certified copy.

Furniture in	room No. 1,	$240.00
"	passage, No. 2,	205.00
"	dining-room, No. 3,	302.00
"	large dining-room, No. 4,	494.00
"	up-stairs passage, clock and lamp,	40.00
"	bedroom No. 1,	187.00
"	bedroom No. 2,	90.00
"	bedroom No. 3,	12.00
"	bedroom No. 4,	68.00
"	bedroom No. 5, included in above.	
"	kitchen,	10.00
Silver ware,		426.00
1 gig, $10, carriage destroyed in a hurricane,		10.00
1 set China (table), $130, 1 lot glass ware, $100,		230.00

"PETIT DE VILLERS,
W. ROSE,
J. B. HERBERT, } *Appraisers.*"

In April, 1829, Charlotte Scarborough married James Taylor, one of the defendants in the present suit. They removed to New York to reside, in 1835, and afterwards to New Jersey, where the complainant resided at the institution of this suit. Julia Scarborough, the mother of the complainant, resided in the house in question, at and after the execution of the deed, as did William Scarborough, the father, with occasional absences, until 1835, when he rented it to Barnsley, who had married one of his daughters, and who was also one of the defendants in the present suit.

On the 12th of June, 1838, William Scarborough died.

In the early part of 1840, a petition was filed in the Superior Court of Chatham County, in the names of the different branches of the Scarborough family, stating the death of William Taylor, the trustee under the deed, and praying that Robert M. Goodwin might be appointed in his place; which was accordingly done. To this petition the name of Charlotte Taylor was signed as follows:—"For Charlotte Taylor, Joseph Scarborough."

*On the 4th of September, 1843, Charlotte Taylor filed her bill against all the parties enumerated in the commencement of this statement. [*189

It recited the devises of the will, stated that she was the niece by marriage of Robert Isaac, and an inmate and resident of his family, with whom she continued to reside until his death, when she removed to the residence of her father and mother, being the house devised to her (the oratrix) by the will. It then averred, that, upon her return to the family of her parents, her reception was harsh and unkind; that she was charged with having dictated to the testator, Robert Isaac, the disposition of the property, with ruining the prospects of the family, and breaking the heart of her father. The bill then proceeded thus:—

"And your oratrix further showeth unto your honors, that day after day your oratrix's situation in her father's family became more and more unpleasant and harassing, in consequence of their unkind and, as your oratrix charges, their cruel treatment of her; that your oratrix was at the time an infant under the age of twenty-one years, having been born, as your oratrix charges, on the 4th day of August, in the year of our Lord 1807; that your oratrix was closely watched by her father, mother, and sisters, secluded from society and the advice of friends, and even denied the liberty of communicating with the defendant, James Taylor, whom your oratrix was then under an engagement to marry; that your oratrix was importuned and urged by her mother, with the advice and countenance of her father to relinquish your oratrix's rights under the will aforesaid, and to settle the property on your oratrix, her mother, brothers, and sisters; and with the view of effecting this object, it was particularly urged that the said Robert Isaac, by the said devise and bequest in the seventh item of his said last will and testament, had so conveyed the said property, believing that your oratrix would divide the same in the manner proposed by your oratrix's parents as before stated, although your oratrix at the time knew that the said Robert Isaac had, for a considerable time preceding his death, borne a decided antipathy to the said Julia Scarborough.

"And your oratrix further showeth unto your honors, that, when in answer to these and other repeated importunities most unkindly pressed upon your oratrix, your oratrix would hesitate or refuse to enter into and yield to the proposed arrangement, your oratrix's reluctance and refusal would be ascribed to the influence of the said James Taylor, who was described to be a merciless, grasping man, who would sacrifice any thing for a gain.

*190] *"And your oratrix further showeth unto your honors, that when again, in reply to the urgent importu-

nity of the said Julia Scarborough, your oratrix inquired of her what your oratrix should do, your oratrix, after a conference between the said Julia and William Scarborough, was informed that your oratrix should address a letter to the said William Scarborough, to the effect that, supposing the said Robert Isaac had intended the property should be divided between your oratrix, her mother, sisters, and brothers, your oratrix wished that he, the said William Scarborough, would consent that your oratrix should so have the property disposed of that the said Julia Scarborough should have it during her life, and that after her death it should be divided between your oratrix, her two sisters and two brothers.

"And your oratrix further showeth unto your honors, and expressly charges, that at this stage of the matter your oratrix sought an interview with the said James Taylor, and, after relating to him the circumstances above detailed, asked his opinion and advice as to the duty of your oratrix in the premises, and that his reply was, in substance, that individually he cared nothing about the course your oratrix might pursue, as he was well off, and that he would never meddle with a copper of the value of the property, but advised your oratrix, as she valued her own interest, not to yield to the arrangement proposed by the parents of your oratrix.

"And your oratrix further showeth unto your honors, that at the time referred to the affairs of the said William Scarborough were in a very deranged and embarrassed condition; that he was utterly unable to pay his debts; and that, as a consequence, his family having but very small resources independently of him, their pecuniary situation was pitiable and distressing; and that, urged by this consideration, by the unhappiness and even misery which your oratrix was suffering from the treatment of the family and their importunity, and influenced, too, by the hope that her marriage with the said James Taylor might thereby receive the consent of her parents, your oratrix finally yielded, and wrote the letter to her father, reciting, in substance, as your oratrix charges, that the said Julia and William Scarborough were to have the house, furniture, &c., during their lives, and that at their death the plate, with the crest of the family, was to be given to your oratrix's brothers as their share, and the house and lots divided between your oratrix and her sisters. Your oratrix charges the above to have been the substance of the writing, but that she cannot now ascertain the particulars, as the original draft, which was kept by *your oratrix, [*191
was destroyed by fire in the city of New York in the year 1835."

The bill then proceeded to state that a deed was drawn up, which she signed, without reading or hearing it read; that, so far from the marriage settlement upon her mother being an inducement to the execution of the deed, as is alleged, she now finds, in the recital, she had never at that time heard of any such marriage settlement; but, on the contrary, the deed was extorted from her by the most unfair and fraudulent means, and was executed by her as the price of peace with her father, mother, and family.

The bill then stated the marriage of the oratrix with James Taylor, on the 28th of April, 1829; that she had, soon afterwards, used all the means in her power to convince her husband that the deed was fraudulent and invalid, but that he objected to family disputes about property, and averred that his own individual property and means of support were sufficient for his family. It then stated that she did not discover the amount of injustice which had been practiced upon her until the year 1839, when she discovered that, under the deed, in case she died before her mother, her children would be cut off from all share in the property. It then stated the death of Taylor, the trustee, and the appointment of Goodwin in his place, and averred that she was entirely ignorant of the use of her name, which was signed to the petition without her authority.

The bill then stated that Godfrey Barnsley had intermarried with her sister, Julia Scarborough, and resided for a long time in the house in question; that he had committed waste upon the goods and chattels bequeathed to her (the oratrix), had sold or otherwise disposed of a considerable portion of the stock of liquors, and that waste had also been committed by Julia Scarborough, the mother; that Barnsley knew that the oratrix had a claim to the personalty; that she had applied to Goodwin, the trustee, to come to an account with her, which he had refused to do.

The bill then contained a number of interrogatories for the defendants to answer; prayed that the deed might be decreed fraudulent and void, and that the defendants might come to an account with her, and that the real estate, goods, chattels, plate, furniture, goods, prints, rents, and profits, might be decreed to be the separate property of the oratrix, not subject to the debts or liable to the creditors of her husband, James Taylor, &c., &c.

Sundry intermediate steps were taken to bring the defen-
*192] dants all into court, which it is not necessary to mention. At *length they all came in and answered, except Julia Scarborough, the mother, and Joseph Scarborough,

against which two parties an order was obtained, taking the bill *pro confesso*.

Robert M. Goodwin, the trustee, filed his answer on the 6th of November, 1843, admitting the existence of the trust deed, and that it was under his control; and stating that he consented to act at the request of Horace Sistare, who married the complainant's sister, and of Joseph, her brother, and that he supposed he was acting with her consent, not only because her brother signed her name to the petition for his appointment, but because, in conversations with her, she never expressed the least objection to the appointment. That William Taylor left no accounts, never having interfered with the property, or received it into his possession, or any of the rents, issues, or profits, the same being left in the custody or possession of the *cestui que trusts* entitled thereto. He denies that the trust deed was made by compulsion or undue means, or that it was made by her when under age; but, on the contrary, avers that the same was made freely and voluntarily, and that she was then of full age, as would more fully appear by a letter written by her to her father, dated 10th January, 1828, a copy of which he annexed to his answer.

The answer of the executors of William Taylor was filed 6th November, 1843, and states that they do not believe their testator acted as trustee, though he may have assented to the trusteeship; that they have never seen any account of his as trustee, and do not believe he left any; for he regarded the matter as a mere family arrangement, and left every thing in the hands of the *cestui que trust*, then entitled to the use of the same. They deny the right of the complainant to call on them for an account of the personal property conveyed in trust, because by the trust deed Julia Scarborough, who is still living, has the use of it for life; nor can they give any account of said property, or the rents and profits of the real estate, because the said real and personal property never passed into the hands of their testator in his lifetime, nor into their control or possession since his death, but had always been in the possession and management of Julia Scarborough, the *cestui que trust*, entitled to the same under the deed.

The joint answer of Godfrey Barnsley and Julia, his wife, was filed 19th February, 1844, and in substance states that the complainant always called her mother's house her home, and lived as much there as with her uncle; that she was not an infant at the time of the execution of the deed, having been born on the 4th of August, 1806; that they do not know of any *consideration other than that stated [*193
in the deed; that Julia Scarborough lived on the premises at

the time of its execution, and that William Scarborough sometimes resided in Darien, and sometimes on the premises, until 1833, after which he generally resided on the latter; and that complainant never, as far as they know, pretended to have any claim thereto; and as late as April or May last (1843), when defendant, Julia Barnsley, in consequence of rumors which had reached her, asked complainant, "if it was true, as she had been informed, that she (the complainant) intended to attempt to set aside said deed," she stated, "she had no such intention." They deny, as utterly and entirely untrue, the statement of the complainant of unkind treatment by her family, and never heard or knew of any, or of any importunity or coercion used towards her to induce her to sign the deed; that they always believed the execution of the deed was the free, voluntary act of the complainant, and intended to fulfil the design of Robert Isaac, whose title they insist is more than doubtful, in consequence of the marriage settlement of 1805; that they are advised that the said deed was and is valid, as between the parties to the same, and therefore William Scarborough could not make any conveyance to Robert Isaac; and that he always held the premises subject to the marriage settlement, and that they have always heard it in the family, and so believe, that the complainant executed the deed freely and voluntarily, with a view to carry out the wishes and intentions of her uncle, which would otherwise have been defeated. They further allege that no marriage settlement between the complainant and her husband was ever executed, and he having been recently declared bankrupt, any interest which she may have in the property, or any claim against them, belongs to the said James Taylor, or his assignee in bankruptcy. The answer then explains the defendant Godfrey Barnsley's actings and doings with respect to the property.

The answer of James Taylor, the husband of the complainant, admitted all the material facts charged in the bill, and stated that before the marriage he had advised her not to execute the deed, believing, from her representations, that she was unkindly treated by the family; that he had been requested by William Scarborough to be a witness to the execution of the deed, but declined to be so, and that his belief of the unhappy situation of the complainant operated upon him in a great measure to consummate his engagement to marry her twelve months prior to the period before intended.

Several witnesses were examined on the parts of the com-

plainant and defendants. The following were the answers of *the subscribing witnesses to the deed, viz., Andrew Low and John Guilmartin, touching its execution. [*194

Andrew Low:—

"To the fourth direct interrogatory the witness answering saith,—I was intimate in the family of the late William Scarborough, both before, in, and after 1828; I was a subscribing witness to the signing of the deed, and after it was signed the complainant expressed to me that she was then satisfied, and was glad that she had done it, or words to that effect.

"To the fifth direct interrogatory the witness answering saith,—I was present, as stated before, at the execution of the deed; it is impossible, at this distance of time, to remember all that then transpired, but this I am certain of, that the complainant knew the contents of the deed, and approved of it; in fact, as I have before said, she herself told me so.

"To the fourth cross-interrogatory the witness answering saith,—I became acquainted with the circumstances I have stated, relative to the property, from my personal intimacy with William Scarborough and his family, and upon my connection in business with the late Robert Isaac. I was a subscribing witness to the deed at the instance of William Scarborough.

"To the fifth cross-interrogrtory the witness answering saith,—I do not know by whom the deed was drawn; the other subscribing witness was Mr. Guilmartin; he was requested to be so by William Scarborough. There was a change of one of the witnesses of the deed, in consequence of James Taylor, who had previously arranged to be a witness, declining to be so after his arrival at William Scarborough's house, for that purpose. I do not remember that he gave any reason for declining. The parties present, when the deed was executed, were the complainant's father and mother, and the witnesses. I did not see or hear the complainant read the deed, but I was then, and still am, satisfied that she knew the contents, and approved of it.

"To the sixth cross-interrogatory the witness answering saith,—I do not recollect the question being put to the complainant, whether she knew the contents of the deed, nor do I recollect whether any consideration money was offered; if there was, it was a piece of coin, probably a dollar, in the usual way, in such cases; I think I was in William Scarborough's house about two hours previous to signing the deed, and left soon after.

"To the seventh cross-interrogatory the witness answering saith,—James Taylor, now the husband of the complainant,

had been asked by Mr. Scarborough to attest the deed as a witness, and he consented to go with me to the house *195] for that purpose; *after closing our place of business, I asked him to accompany me; he said he would soon follow me, which he did; he did not express himself opposed to the execution of the deed, that I am aware of; I certainly never heard him. It was not known or understood by me, that he was under an engagement to marry the complainant; the previous year there was something of the kind spoken of, but he and the complainant had disagreed, and I was given to believe that it was all broken off. At the dissolution of the partnership of Low, Taylor and Company, in 1834 or 1835, James Taylor was largely indebted on private account to the said firm; and some time in 1835 I granted him a discharge from the said debt, in consideration of his giving up to me every description of property belonging to himself and his wife, except his household furniture, which I allowed him to retain; he did not at this time mention to me that he or his wife had any claim to the property in question, or I should have claimed it in conformity with our agreement. I had never heard of his making any claim to the property conveyed by the said deed, or any part it, until advised of it by William Robertson, under date of the 16th February, 1844."

John Guilmartin:—

"To the first direct interrogatory the witness answers and says, that his name and handwriting is to the instrument as a witness, and that he subscribed as a witness, at the instance of William Scarborough, the deed now presented to him, being the original deed from complainant to William Taylor, in trust.

"To the second direct interrogatory the witness answers and says, he cannot say positively he does, but it strikes him that there was a question or two asked Miss Charlotte Scarborough, viz., whether it was with a free will; he does not recollect the time; but that he does not recollect that Andrew Low, senior, was present when he came in; Mr. Scarborough said he had sent for witness, as such to a deed from Miss Scarborough to her mother, of property, which as a dutiful child she had made. Witness asked Miss Scarborough if it was her voluntary act. Mr. Low replied, that witness was called in to witness the deed, and for no other purpose; she did not read the deed, or hear it read in witness's presence. It was executed at Mr. Scarborough's house, in West Broad street."

At the April adjourned term of 1846, the cause came up

for argument before the Circuit Court, when the bill was dismissed.

The complainant appealed to this court.

It was argued by *Mr. Holmes*, for the appellant, and *Mr. Johnson* (Attorney-General), for the appellee.

Mr. Holmes first remarked upon the lapse of time, [*196 which he contended was not sufficient to bar a recovery. 3 Atk., 558; 2 Eden, 285; 2 Story Eq., §§ 1520, 1521; 1 How., 189; 4 Id., 560.

The points raised by the pleadings in behalf of complainant, for cancellation of the deed, were,—

1. Duress.
2. Want of consideration.
3. Fraud, growing out of the relation of the parties as parent and child, trustee and *cestui que trust.*

1. Duress. (*Mr. Holmes* commented upon the evidence in the case, to establish this.)

2. Want of consideration. It is admitted that mere inadequacy of price is not of itself a distinct ground of relief in equity. But, under peculiar circumstances, it may amount to such fraud as will be relieved against. 1 Story Eq., § 246; 1 Dessaus (S. C.), 651; 11 Wheat., 124.

3. The relation of the parties; and

1st. Of parent and child. All contracts and conveyances, whereby benefits are secured by children to their parents, are objects of jealousy. 1 Story Eq. Jur., § 310; 2 Atk., 85, 258; 4 Wash. C. C., 397; 12 Pet., 258; 2 Johns. (N. Y.) Ch., 252.

2d. The relation of trustee and *cestui que trust.* Taylor, the grantee in trust, and Scarborough, were two of the executors of the will of Isaac. The will was proved only five days before the execution of the deed. Executors are trustees for legatees. 1 P. Wms., 544, 575; 1 Story Eq., § 322; 7 Ves., 166; 1 Story Eq., § 423; 10 Pet., 639.

Both executors and ordinary trustees are prohibited by the rules of courts of equity, from considerations of general policy, from dealing with those whose interests are intrusted, during the continuance of the fiduciary relation. 1 Story Eq., §§ 321, 322; *Hatch* v. *Hatch*, 9 Ves., 292; 1 Johns. (N. Y.) Ch., 497, 620; 4 Id., 303; 7 Id., 174; Lewin on Trustees, 376; Willis on Trustees, 163; Fonbl. Eq., book 2, § 7, and notes; 1 Madd. Ch., 110 *et seq.;* 2 Id., 132; Sugd. on Vend., 421 to 436; *Wormley* v. *Wormley*, 8 Wheat., 421; 1 Pet. C. C., 364; 4 Dessaus (S. C.), 654; *Ex parte Bennett*, 10 Ves., 381, 385, 386 14 Id., 91, 278; 18 Id., 47.

The case of *Hatch* v. *Hatch*, 9 Ves., 292, proves that the rule of prohibition extends to conveyances without consideration of money, as for friendship, kindness, and regard, &c., &c. And it is settled in *Ex parte Bennett*, 10 Ves., 393, that, in order to set aside the sale, it is not necessary to show that the trustee has made any advantage. And see 1 Story Eq., § 322.

*197] *The conduct of the executors having been a breach of trust, it is unnecessary to consider the distinction, if any really exists, between actual and constructive fraud. There is no difference, legally, in the degree of the fraud, and the distinction is between the same kind of fraud, one supported by evidence of actual imposition, and the other being inferred from circumstances. In neither case does the court regard the morality or immorality of the transaction. *Ex parte Bennett*, 10 Ves., 393; 8 Wheat., 468. All such cases are forbidden by "the morality and policy of the law, as it is administered in courts of equity." *Michoud* v. *Girod*, 4 How., 503.

The whole doctrine on this subject has been condensed and illustrated by this court in the case of *Michoud* v. *Girod*, 4 How., 503. The case is too recent to require any particular examination. There the executors, being themselves co-heirs and legatees, bought the estate of their testator at a public sale judicially ordered, denied any fraud in fact or intention, declared that the purchases were rightfully made for a fair price, and yet this court say, in reference to such a transaction, that "an executor or administrator is in equity a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well-considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property which he represents, or any portion of it, though he has done so for a fair price, without fraud, at a public sale." Id., 553, 557. This language covers the whole ground contended for, though the purchase in that case having been *per interpositam personam* was the reason, probably, why the court declared that it "carries fraud on the face of it." And in the same case this court, commenting upon *Davoue* v. *Fanning*, said,—"The inquiry in such a case is not whether there was or was not fraud in fact. The purchase is void, and will be set aside at the instance of the *cestui que trust*, and a re-sale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court." Id., 557.

It would be difficult in principle to recognize a distinction between *Davoue* v. *Fanning* and the case at bar. In that case

a purchase was made *per interpositam personam* for the wife of the executor; here a voluntary conveyance (by which is meant a conveyance without consideration) is taken to one executor for the benefit of the wife of another,—that is, for the benefit of that other, and who himself procured the conveyance to be made. If Scarborough had taken the conveyance directly to himself, or through Taylor, the executor, for his own benefit, *such a transaction could not stand. Will it be permitted to stand, his wife being the *cestui que trust* for life? [*198

(*Mr. Holmes* then argued that the marriage settlement, which was stated in the deed to be one of the considerations thereof, had been treated by all parties for a long time as a void instrument; and then proceeded to examine the doctrine of estoppel as applicable to the case.)

If, then, for any of the reasons assigned,—duress, the relation of the parties, fraud actual or constructive,—the deed of complainant cannot be upheld as a family compromise, between which and the present case there is not the least analogy, the question then recurs, To what relief is complainant entitled?

1. She is entitled to have the deed cancelled.
2. To an account of the personal property, and
3. To an account of the rents and profits of the real estate from the executors of William Taylor, the trustee, and
4. To a settlement of the entire fund upon trustees for her separate use during life, and after her death to her children, or such other equitable settlement as the court may decree.

Mr. Johnson, for the appellees, contended,—

I. That, as it is now admitted that complainant was of age at the time the deed of 22d January, 1828, was executed by her to William Taylor, the character of the said deed takes it out of the principles by which, in certain cases, deeds are in equity considered void, because of the relations of the parties to the same. *Pratt* v. *Barker*, 1 Sim., 1; 2 Cond. Eng. Ch., 1; *Hunter* v. *Atkyns*, 8 Id., 303, 313, 321; *Tendril* v. *Smith*, 2 Atk., 85; *Manners* v. *Banning*, 2 Eq. Cas. Abr., 282; *Smith* v. *Low*, 1 Atk., 490; *Cory* v. *Cory*, 1 Ves. Sr., 19; *Brown* v. *Carter*, 5 Ves., 876; *Hotchkis* v. *Dickson*, 2 Bligh, 348; *Tweddell* v. *Tweddell*, 11 Cond. Eng. Ch., 1–8; *Jenkins* v. *Pye*, 12 Pet., 241, 253.

II. That if the deed was at any time within such principle, the long acquiescence, with knowledge, deprive the grantor of the right to avoid it on that ground. *Peck* v. *Randall*, 1 Johns. (N. Y.), 165; *Mooers* v. *White*, 6 Johns. (N. Y.), Ch., 372.

2 Story Eq., 736; *Elmendorff* v. *Taylor*, 10 Wheat., 168, 169, 171; *Bank of United States* v. *Daniels*, 12 Pet., 32; *Foster* v. *Hodgson*, 19 Ves., 185; *Gregory* v. *Gregory*, Coop., 201; *Prevost* v. *Gratz*, 6 Wheat., 497.

III. That there is no evidence of duress in fact, or of undue influence, or of fraud; that the deed was in all respects a fair and proper deed, being supported by the consideration of love and affection; and if that of itself was not sufficient, it is valid by reason of the marriage contract between the father and mother of the complainant, of the 18th April, 1805, which was omitted to be recorded in Georgia, where the property lay.

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Mr. Justice DANIEL delivered the opinion of the court.

The object of the complainant below, (the appellant here,) as disclosed in her bill, is to vacate the deed, executed on the 22d day of January, 1828, by her before her marriage, conveying to William Taylor in trust for the use of the mother of the grantor for life, (exempt from the debts of her father,) and after the death of her father and mother, for the use in equal portions of the said grantor, and of her brothers and sisters, all the property real and personal which was given to the said grantor by the will of her uncle Robert Isaac, whose will is made an exhibit in the cause and referred to in the deed.

The grounds on which this deed is impeached are the following:—that it was founded on no real consideration; was executed during the nonage of the complainant, and whilst she was living in the family of her parents; that it was extorted from her by false representations, both as to her filial duties, and her rights to the property left her by her uncle; and of extreme urgency and harsh treatment on the part of her parents, to procure its execution; and of the hope, by a compliance with their importunities, of reconciling her parents to her marriage with her husband, which marriage they had theretofore opposed. The objection of nonage must be surrendered in this investigation, it being ascertained that the complainant was some few months over majority when the deed was executed. The other allegations, as resting upon the proofs in the cause, and upon the law as applicable to them, remain for consideration.

The rules of law supposed to control the contracts of parties who do not stand upon a perfect equality, but who deal at a disadvantage on the one side. whether applicable to the relations of parent and child, trustee and *cestui que trust*, attorney and client, or principal and agent, have been laid down in various cases in the courts both of England and of our own

country. To trace these rules to the several cases by which they have been propounded would be an undertaking rather of curiosity, than of necessity or usefulness here, as the extent to which this court has applied them, or is disposed to apply them in cases resembling the present, may be found within a familiar and direct range of inquiry. They are aptly exemplified by the late Justice Story, in his treatise on Equity Jurisprudence, Vol. I., § 307, where, speaking of frauds which "arise from some peculiar confidence or fiduciary relation between [*200 the parties," *he remarks,—"In this class of cases there is often found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which courts of equity act in regard thereto stands independent of any such ingredients, upon a motive of public policy; and it is designed in some degree as a protection to the parties against the effects of overweening confidence and self-delusion, and the infirmities of hasty and precipitate judgment. These courts will therefore often interfere in such cases, where, but for such peculiar relations, they would wholly abstain from granting relief, or grant it in a very modified and abstemious manner." He proceeds, § 308,—"It is undoubtedly true, that it is not upon the feelings which a delicate and honorable man must experience, nor upon any notion of discretion, to prevent a voluntary gift or other act of a man whereby he strips himself of his property, that courts of equity have deemed themselves at liberty to interpose in cases of this sort. They do not sit, or affect to sit, in judgment upon cases as *custodes morum*, enforcing the strict rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and cunning, and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and *personal good*. Courts of equity will not, therefore, arrest or set aside an act or contract, merely because a man of more honor would not have entered into it. There must be some relation between the parties which compels the one to make a full discovery to the other, *or to abstain from all selfish projects*. But when such a relation does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance." Applying the principles thus annunciated and drawn from an

extensive collection of the English cases to the relation of parent and child, and to transactions occurring in that relation, the same author remarks, § 309,—"The natural and just influence which a parent has over a child renders it peculiarly important for courts of justice to watch over and protect the interests of the latter; and therefore all contracts and conveyances, whereby benefits are secured by children to their parents, are objects of jealousy, and if they are not entered *201] into with scrupulous good faith, and are not reasonable under the circumstances, they will *be set aside, unless third persons have acquired an interest under them."

The same principle has been clearly put by Justice Washington, in the case of *Slocum and Wife* v. *Marshall*, 2 Wash. C. C., 400, where, in stating that case, he remarks,—"The grantor, a young lady who from her birth had not but on one occasion left the roof of her father,—bound to him by the strong ties of filial affection,—accustomed to repose in his advice and opinion the most unbounded confidence, and to consider his request ever as equivalent to a command,—is informed by him that a certain portion of her property had been conveyed to *him* by her mother, but that the same, from some legal objection, had failed to take effect. She is then requested to confirm this title, and at the same time is assured by her father, that his design in obtaining this confirmation is to promote *her* interest as well as his own. She reflects upon the proposal, and, influenced by the double motive of promoting her own interest and that of her father, and of fulfilling the intentions of her dead mother, she makes the conveyance." He proceeds,—"A transaction attended by such circumstances will naturally excite the suspicions of a court of equity." It has been insisted that, for the principles just stated, the sanction of this court cannot be avouched; but that, on the contrary, they have been weakened, if not rejected, by the doctrines ruled in the case of *Jenkins* v. *Pye*, 12 Pet., 241. The peculiar features of the last-named case, which may in some respects distinguish it from the one now under consideration, and be thought to bring it less obviously within the principles above stated, need not be pointed out; but we inquire what are in truth the doctrines ruled in the case in 12 Pet.; and whether they are not substantially, nay literally, those propounded by Justices Story and Washington. In the case of *Jenkins* v. *Pye*, this court refuse to adopt the rule which they said had in the argument been assumed as the doctrine of the English chancery, viz., that a deed from a child to a parent should, upon considerations of public policy arising from the relation of the parties, *be deemed void.* They

deny, indeed, that this is the just interpretation of the English decisions relied on, but declare that all the leading cases they have examined are accompanied with some ingredient showing undue influence exercised by the parent, operating upon the fears or hopes of the child; and showing reasonable grounds to presume, that the act was not *perfectly free* and *voluntary* on the part of the child. But the court, whilst they deny that a deed from a child to a parent should *primâ facie* be held *absolutely void*, as unequivocally declare, that "it is undoubtedly *the duty of courts [*202 of equity carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance." Between the doctrine here ruled and the principles stated by Justices Story and Washington, no difference, much less any contradiction, can be perceived. For why this watchfulness, thus enjoined as a *duty*, this severe and peculiar scrutiny as applicable to contracts between parent and child, but that they are justly "objects of jealousy," rendered so by the relation of the contracting parties,—a relation aptly and naturally productive of powerful influence on the one hand, and of submission on the other,—subjecting such transactions to presumptions never attaching *a priori* to contracts between parties standing upon a perfect equality.

And now let the character of the contract under consideration, and of the circumstances surrounding the execution of that contract, be subjected to the test rationally and justly imposed by the rules above stated.

This is a contract between parent and child, operating by its terms exclusively for the benefit of the former, and to the prejudice of the latter; for it transferred from her a valuable interest, by the very terms of the transaction admitted to be legally and absolutely hers, and by the same terms transferred it without the shadow of an equivalent received or proffered; and for which, the testimony conclusively shows, none could possibly be given. Thus far the provisions of the contract.

With regard to the circumstances attending and surrounding its execution. It is shown that the grantor in this deed, though of age, had little more than attained to majority; that she was living in the house with her parents,—her only home; and may fairly be presumed to have been liable to the influence of feelings and habits which, in the absence of contravening evidence, would control the dispositions and conduct of a youthful female thus situated. She might be moulded to almost any thing, in compliance with the earnest wishes

(with her habitually yielded to as commands) of her parents. Those parents, who once had lived in affluence and luxury, had, with all the habits and necessities which such a condition naturally creates, by commercial reverses been brought to indigence; from the date of the purchase by Robert Isaac of the property in dispute, had been permitted by him to occupy and enjoy it. In fact, it was apparently their only means of shelter or support. In this state of the family, Robert Isaac *203] by his will bestowed the whole of this property upon the complainant; and it has been *argued that, with her knowledge of the situation of her parents, the impulses of filial duty and affection might of themselves have formed a sufficient groundwork for the complainant's conveyance. However hazardous it might be to prescribe, as a rule of right or of property, imperfect obligations which the law does not originally enforce, this argument can be deemed satisfactory in instances only in which the motives supposed to enter into such obligations are shown to have been free and unconstrained in their operation. In the present instance, too, independently of the influences which will be shown to have been brought to bear upon the transaction, it is thought that the injunctions of filial duty and affection would have demanded something less than the surrender of all possessed by the grantor; and would have been satisfied with a concession, as to which there probably would never have existed a difficulty,—one, indeed, that seems to have been assented to in practice,—the occupation and enjoyment of the property during their lives, by the parents of the grantor. Nay, it would seem that proper *parental* tenderness, and solicitude for the welfare of the child, or the true principles of rectitude and fairness, would have permitted nothing beyond this. And in the estimate of motives which may have led to the transaction under review, it should not be without weight, that this same filial duty and affection, however commendable in themselves, and however their spontaneous action may be recognized and binding, strengthen the probability of their being converted into means of wrong and oppression; and this very probability it is which challenges the duty of watchfulness and jealousy in the courts, in scanning the transactions of those whose peculiar situation exposes them to danger from such means.

Immediately after the death of Robert Isaac, it seems that the various appliances designed to withdraw from the complainant the fruits of the bounty of her affectionate uncle were put into strikingly active operation. Directly following the death of Isaac, it is charged in the bill, came the urgency of

the complainant's family, and their reproaches against her for having intercepted, as they said, the bounty which but for her would have flowed to the family; and for having dictated to her uncle the disposition of his property; thereby having ruined their prospects, and broken the heart of complainant's father. The natural effects of such appeals upon the feelings of an affectionate and sensitive girl, or even upon a spirit awake to the impulses of pride alone, can easily be comprehended. Then, as is alleged, was the reluctance of the complainant to despoil herself of her property ascribed to the avarice of her intended husband; *and then, too, [*204 amidst her perplexity and distress, upon consultation between both her parents, was suggested to her the device of a letter from her, declaring her belief of the wish of the testator, Isaac, to bestow the property for the benefit of the family; and asking the consent of the father of the complainant to a settlement of the property in conformity with such a wish. Although these allegations are not supported by direct statements of witnesses, yet the intrinsic evidence flowing from other conduct of the parties to these transactions, and that presented by the written documents in this cause, impart to the above allegations a force equal, if not surpassing, that which an explicit narrative by witnesses could give them. And here it is worthy of remark, that the will of Robert Isaac contains no expression nor hint of a desire, or intention, that the property should go according to the supposition assumed; or according to the provisions of the deed subsequently executed. This circumstance alone should be one of controlling influence, even if the testator could be regarded as a person of a capacity and character of the most inferior grade. But none can fail to perceive, from the proofs in this cause, that the testator was a man of intelligence and sagacity, extensively practised in the business of life. He strongly declares his affection for his niece, and as clearly gives to her, and to her only, the property in dispute. What room is here for assuming, that others, and not this niece, were the *chief* objects of his bounty? Such an assumption is forbidden by every rule of law, or of common sense; it goes very far, of itself, to stamp with fraud and contrivance the means resorted to in order to divert that bounty to other ends.

We will next consider the letter (Exhibit A, filed with the answer of Goodwin) addressed by the complainant, then Charlotte Scarborough, to her father; concocted, as is alleged by the complainant, between her parents, as preparatory and introductory to the wrong about to be consummated; in which letter she professes her readiness and her desire to settle the

bestow. Turning then to the recitals of this deed, they must be regarded as wholly irreconcilable with truth; and especially with that *uberrima fides*, that fullness of candor and fairness, required in transactions between parent and child; transactions upon their face, too, operating to the disadvantage of the latter. This deed sets out a marriage contract entered into between Scarborough and his wife, anterior to their marriage, purporting to cover a portion of the property in dispute; *207] it then states the failure of this contract by reason of an omission to record it, and *proceeds to declare, that, some doubts having been suggested as to the validity of the said marriage settlement, from the omission to record the same, the said William Scarborough did, in consequence of such doubts, transfer and convey all his right, &c., to the said Robert Isaac, and that the said Isaac, having departed this life, had left this property, with certain personal estate, to his niece Charlotte Scarborough; and that she to whom the devise and bequest had been made, being desirous of carrying the marriage settlement into effect according to the original intent of the parties, had, on coming of age, determined to convey all her right, title, and interest in the property derived from her uncle, for that purpose.

The deductions from these recitals,—nay, their necessary meaning, we may add, their literal import,—are these. That the conveyance from Scarborough to Isaac was with the sole view of effectuating the marriage settlement, and of curing any defects attributable to that contract; that Isaac took the property clothed with this trust, and for no consideration moving from himself; and vesting in him an absolute title or estate; that his devise and bequest to his niece were purely to secure the same objects, and that *she*, fully aware of all these acts and intentions, had, as soon as she could legally do so, determined upon their accomplishment. Such are the declarations and recitals contained in this deed; not one of which, save the statement of a project of a marriage settlement, that is not by the evidence on the record shown to be palpably false. Thus, if we look to the deed from Scarborough to Isaac of the 13th of May, 1820,—to the agreement between Isaac and McHenry as the agent of A. Low & Co., in February, 1826,—and to that between Robert Isaac and Andrew Low, on the 8th of March, 1827,—and also to the return of the marshal of the sale under execution of the personal property in dispute, we find that Isaac was the purchaser and exclusive owner of all this property, for a pecuniary consideration paid by him of nearly twenty-three thousand dollars. Looking next from the recitals of this deed to the will

of Robert Isaac, we find no ambiguity, no declaration, hint, or implication in the will to sustain these recitals; but every thing to falsify and condemn them. We there see clearly the motive of the testator; *his affection* for his favorite niece, and the subjects and the mode with and by which he designed that his affection should be manifested. He gives to her, clear of all trusts or encumbrances, "the lot, dwelling-house, and all other improvements thereon, which formerly belonged to her father, together also with the plate, furniture of all kinds, books and prints, all of which *were purchased and [*208 paid for at marshal's sale by me." If this clause of the will were shown to and clearly understood by the complainant, it is difficult to conceive how it could be made rationally to express or imply a duty on her part to disrobe herself of this bounty, as being clearly designed for others, and not for herself. The conduct of these persons, Scarborough and Low, and of Taylor, who was named as trustee both in the marriage settlement and in the deed from Charlotte Scarborough, furnishes convincing evidence of the light in which they viewed any obligation supposed to be adhering to this property, and forming a binding consideration, either legal or moral, for the deed now impugned; that is, an obligation to bestow it, in conformity with the stipulations of the marriage contract. But it may be naturally asked, if this supposed obligation was limited to Charlotte Scarborough. Did it not, if existing at all, extend equally to her father, and to the trustee in the settlement, and to others acquainted or connected with that contract? In a moral view, at least, no difference is perceived in the position of these parties, and it is not pretended that Charlotte Scarborough sustained any legal obligation to convey away this property. Yet it is seen by the record, that William Scarborough, to serve his convenience or his interest, had no difficulty in subsequently encumbering it both to Low and to Taylor, the trustee in the marriage settlement, or in subsequently selling it out and out to Isaac; and that this same trustee, Taylor, manifested as little scruple for the sanctity of his trust, in its application for his own benefit. And it seems to us to be a most pregnant state of facts connected with this deed, that, when it was to be executed, Taylor and Low, who had so dealt with this property as to be necessarily cognizant of the falsehood of the recitals it contained, were carried to the house of Scarborough to become, the first the trustee, the second a witness to this instrument. The other witness to this deed, John Guilmartin, seems to have been taken under the stress of necessity, from the refusal of James Taylor to attest the deed,

and the manner in which the transaction impressed itself upon Guilmartin, is evinced in his deposition, in which he says that he inquired of Miss Scarborough whether this deed was her voluntary act, but was permitted to have no answer from her, and was silenced in his inquiries by the remark from Low, that the witness had been sent for to *attest the deed, and for no other purpose.* This witness further swears, that the deed was not read to nor by the grantor in his presence. He states, moreover, this uncalled for remark on the part of the father
*209] (although witness was not permitted to obtain information *from the child),—that he, Scarborough, had sent for the witness to attest "a deed from Miss Scarborough to her mother, *which as a dutiful child she had made.*" Again, when this deed from Charlotte Scarborough was to be proved, the only witness to its execution called on was Andrew Low; he who knew that its recitals were inconsistent with truth, he who deemed all inquiry about the willingness of the grantor to make it to be impertinent. John Guilmartin was passed by; he might have revealed, if called, circumstances coeval with the transaction, which would be calculated to remove or to weaken the influence of seeming acquiescence, or of the lapse of time; circumstances which time alone, in the absence of direct impeaching testimony, would be competent entirely to cover up. The testimony adduced in support of the deed from the complainant falls far short of the object for which it was intended; much of that evidence, too, seems to have been given under influences necessarily detracting from the weight which it otherwise might have had. It wholly fails to countervail the evidence arising from the statements of witnesses on the other side; from the relative positions of the parties; and, more than all, from the intrinsic nature and force of the documents relied on both by plaintiff and defendants in the court below. From a careful analysis of the facts and circumstances of this case, we think the conclusion cannot be resisted, that the deed from Charlotte Scarborough to William Taylor, of the 22d of January, 1822, was not a fair and voluntary transaction; but was drawn from her by means and under influences which rendered that conveyance void. We are, therefore, of the opinion, that the real property conveyed by that deed should be reconveyed to the said Charlotte, now Charlotte Taylor; and that the several articles of personal property bequeathed to her by her uncle, Robert Isaac, so far as the same are now in existence, and in the possession or under the control of Mrs. Julia Scarborough, or of any other person acting under her authority, or claiming from her and not for valuable consideration without notice, or claiming

under like circumstances from any person by virtue of the provisions of the deed of trust above mentioned, should be delivered up to the complainant as her own property; but it is the opinion of this court, that rents and profits for the use and occupation of the real estate above mentioned, or compensation for the use and enjoyment of the personal property bequeathed to the complainant, should not be allowed her under all the circumstances attending this case; they are accordingly hereby denied her. It is therefore, upon consideration, adjudged, ordered and decreed, that the decree of the Circuit Court *for the Sixth Circuit and District of [*210
Georgia, pronounced in this cause at the April term of
that court in the year 1846, be, and the same is hereby, reversed; and this cause is remanded to that court, with directions to decree therein in conformity with the opinion herein above expressed.

Mr. Justice WAYNE remarked, that the decree given in this case was that which he wished to be given in the court below. But the judges of the Circuit Court not being of the same opinion, the bill of complaint was dismissed, that there might be an early appeal to the Supreme Court. He concurs altogether in the reasoning and conclusions which have just been announced by the court.

Mr. Justice NELSON and Mr. Justice WOODBURY dissented.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Georgia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to decree therein in conformity to the opinion of this court.

JOHN MAXWELL, ADMINISTRATOR DE BONIS NON OF ROBERT MAXWELL, DECEASED, APPELLANT, *v.* JOSEPH S. KENNEDY, JESSE CARTER, MARY L. CARTER, HIS WIFE, DANIEL E. HALL AND DELPHINE HALL, HIS WIFE, AND MARTHA KENNEDY.

A lapse of forty-six years is a bar to relief in equity, although the creditor, during all that time, supposed the debtor to be insolvent and not worth pursuing, where it appears that for a considerable portion of that time he was in a condition to pay, and the creditor might, by reasonable diligence, have discovered it, and recovered the money by a suit at law.[1]

Where, upon the case stated in the bill, the complainant is not entitled to relief by reason of lapse of time and laches on his part, the defendant may demur.[2]

THIS was an appeal from the Circuit Court of the United States for the Southern District of Alabama.

*211] The bill was filed in the court below by Maxwell, the appellant, *against the above-named defendants, as the heirs of William E. Kennedy. Joseph and Martha Kennedy were his children, and Jesse Carter and Daniel E. Hall had married his daughters.

As the sole question which came up to this court was the correctness of a judgment of the Circuit Court in sustaining a demurrer to the bill, it is only necessary to state the substance of it.

The bill averred, that on the 10th of November, 1797, Robert Maxwell, the intestate of the complainant, recovered a judgment in South Carolina, against William E. Kennedy, the ancestor of the present defendants. The judgment was for £1,000 sterling, and costs, £114 9*s.* 2*d.*, no part of which was ever paid.

That immediately after the rendition of the judgment, in order to avoid the service of a *capias ad satisfaciendum* which had been issued, and also to avoid being apprehended for the murder of the said Maxwell, for which he had been indicted, Kennedy fled from South Carolina. Two or three years afterwards he was apprehended in Georgia, brought back to South Carolina, tried and acquitted. At this time he was stated in the bill to have been insolvent. Immediately afterwards, he returned to Georgia, where he remained for four or five years,

[1] CITED. *Landsdale* v. *Smith*, 16 Otto, 392-3; *Pulliam* v. *Pulliam*, 10 Fed. Rep., 26. See notes to *Bowman* v. *Wathen*, 1 How., 189, and *McKnight* v. *Taylor*, Id., 161.

[2] FOLLOWED. *Olden* v. *Hubbard*, 7 Stew. (N. J.), 86. CITED. *National Bank* v. *Carpenter*, 11 Otto, 568; *Credit Co.* v. *Arkansas Central R. Co.*, 15 Fed. Rep., 55.

still insolvent, so that no effort could have been successfully made to collect the above-mentioned judgment.

That after the expiration of that time Kennedy left Georgia, without its being known to any one in that part of South Carolina where he had gone, until about three years before his death, when, some time in the year 1822, it was ascertained that he was living in Mobile. That he was then residing with his brother, one Joshua Kennedy, and apparently dependent upon him for support. That when Kennedy went to Mobile, it was in a foreign country, and little or no intercourse existed between it and South Carolina; nor was there for a long time after it had been ceded to the United States. That while Florida was yet a Spanish province, viz., in the year 1806, the said Kennedy acquired an imperfect title to a considerable estate in land, of which, however, the complainant was entirely ignorant. That on the 13th of December, 1824, he conveyed this estate to his brother, Joshua Kennedy, for the consideration of $10,000, which, the bill averred, had never been paid.

That it was not until after the date of this deed, that the complainant discovered that William E. Kennedy was living, and he was then wholly without property.

That in the year 1805, he had married a female subject of *the crown of Spain, who owned considerable real and [*212
personal estate; all of which was settled upon her previously to the marriage.

That on the 9th of April, 1825, William E. Kennedy died. Joshua Kennedy administered upon the estate, and returned an inventory to the Orphans' Court, amounting in value to $267. Up to the time of Joshua's death, which took place in 1839, he constantly represented his brother William to have died insolvent, and these representations prevented the complainant from attempting to enforce the long-standing judgment.

That on or about the 22d of April, 1839, the heirs of the said William E. Kennedy, viz., the defendants in the present suit, filed a bill in the Court of Chancery of the First Chancery Division and Southern District of the State of Alabama, against the heirs and executors of Joshua Kennedy, and obtained a decree against them, which, on an appeal to the Supreme Court of Alabama, was confirmed. This decree adjudged that the deed of 13th December, 1824, was not made upon any consideration valuable in law, but for the purpose of securing an adequate provision for the children of the said William. It therefore further adjudged, that the heirs of

William were entitled to one half of the unsold lands, and one half of the proceeds of all which had been sold.

The bill then proceeded to aver, that a compromise had been made by the heirs and representatives of these two brothers, a discovery of which was prayed; and that, when made known, the share of the lands so conveyed to the heirs of William E. Kennedy might be held bound to satisfy the judgment obtained by the intestate of the complainant. It concluded with a general prayer for other and further relief.

One of the exhibits attached to the bill was a copy of the decree just mentioned, in the case of *Joseph S. Kennedy and others, Heirs of William E. Kennedy, Complainants*, v. *The Executors and Heirs of Joshua Kennedy*, which decree was passed on the 28th of November, 1840.

To the bill filed by Maxwell in the Circuit Court of the United States against the heirs of William E. Kennedy, the defendants demurred.

In May, 1845, the cause came up for argument upon the demurrer, when the Circuit Court sustained the demurrer and dismissed the bill.

From that decree the complainant appealed to this court.

The case was argued by *Mr. Dargan* and *Mr. Bibb*, for the appellant, and by *Mr. Sherman*, for the appellees.

*213] *Mr. Dargan*, for appellant.

The only question that can be successfully raised to the bill is the statute of limitations.

The idea of staleness is rebutted by the allegations of the bill. On this I will offer no remarks other than those contained in the bill itself.

If I can overcome the statute of limitations, the decree must be reversed. And I contend that the claim is not barred, because it is not within the statute. It is not every action of debt that is barred by our statute. But, on examination, it will be found that actions of debt, founded on lease under seal, bill single, and penal bill for the payment of money only, awards under seal shall be barred, if not sued within sixteen years. See Clay Dig., p. 327, § 81. And in section 82, page 327, it is enacted, that *scire facias* in debt on a judgment rendered in the state of Alabama shall be barred after twenty years. In neither of these sections, nor in any part of the act, is a bar created to an action of debt founded on a judgment rendered in a sister state, or a foreign country.

I think the rule of construing statutes of limitations is well settled, and is this,—that all actions of debt founded on the

grounds, or cause of action, named in the statute, are barred. But that a statute that bars an action of debt on a foreign judgment only would not bar an action of debt on a domestic judgment; and *vice versâ*. To this distinction, *Pease* v. *Howard*, 14 Johns. (N. Y.), 479, is a strong case. The court here say,—"It is not every action of debt that is barred by the statute; but those actions of debt alone, founded on the grounds named in the statute." Hence, if a statute should bar an action of debt founded on a bond, this statute would be no bar to an action on a judgment; or if the statute created a bar to an action of debt founded on a judgment, this act would not bar debt on a bond or lease; nor will an action of debt founded on a statute be barred by a statute barring debt on a lease, &c. 2 Har. & M. (Md.), 154; 1 Mason, 289.

In 2 Saund., p. 64, we find this case:—Debt on award; plea, statute of limitations; and demurrer to the plea. The court held, that debt on award was named in the statute, and therefore not barred. So in 2 Mod., 212, we find:—Debt on a sheriff's return of *fieri facias*. The court say,—"This is an action of debt founded on the breach of a legal duty as an officer of the court, and not on a contract. The statute, therefore, that bars debt on a contract, does not embrace or bar this action, founded on breach of a legal duty."

This distinction is supported by so many adjudged cases, *and seems to be so well founded on reason,— [*214 that is, that a bar created by statute to debt on one cause of action, named in the statute, does not bar debt on another or different cause of action, not named in the statute,—that I submit it with some confidence it will be sustained by the court.

Now courts adopt, but do not create, statutes of limitations. If a demand is not barred at law by statute, it cannot be barred in equity. If, then, there is no statutory bar, is there any other bar to a recovery? Staleness of demand, when the demand is clear and definite, and it has not been asserted because of acts of defendant, (in running off, covering his property, and superinducing the belief of insolvency,) I do not think will be sustained by this court. What circumstance is there alleged in the bill that will take away the right of recovery, in the absence of any bar by statute? It was on this ground that the decree proceeded.

Mr. Charles E. Sherman, for defendants.

This case presents, in a striking point of view, the wisdom of the rule of chancery as to the effect of lapse of time in barring demands. Half a century has passed away since the

judgment sought to be now recovered was rendered. The parties are long since dead, as well as those who administered their estates. The complainant and defendants in the present suit were not born till long after the remote times spoken of in the bill, and can know nothing of what was then done. An entire generation has gone, and with it the evidences of its transactions. In such cases, courts of chancery refuse to interfere. The bill, indeed, admits this, but relies on certain circumstances stated in it, to avoid the conclusions arising from lapse of time, and to excuse the delay and neglect which have occurred. But from the allegations and admissions appearing on the face of the bill itself, and in the exhibits, they will not avail the complainant. The bill admits the fact that Dr. Kennedy's place of residence in Georgia was known; that he was brought back to South Carolina to be tried, no doubt at the instance of the family of Maxwell, and that he was there with an execution against him for this debt in the hands of the sheriff of the district where he was tried and acquitted. He was thus completely within the power of complainant's predecessor for the enforcement of the execution.

It was two or three years before he was brought back from Georgia, and when he returned there, he remained for four or five years more. Here are seven or eight years, during all *215] which time his residence was known, and also during which *he was subject to an action of debt on the judgment in the courts of Georgia, which it was the duty of complainant's predecessor to have brought, if he wished to keep the debt alive. The poverty of a debtor presents no legal excuse for the failure of a creditor to take the means necessary for the preservation of his rights.

There is no distinct or specific allegation as to the time when Dr. Kennedy left Georgia, and none that any pains whatever were taken to discover or ascertain his residence. However, it is admitted that he was discovered to be living in Mobile in 1822; and that he had no property or means is contradicted by the complainant himself, for he admits that he had, as early as 1805, married a Spanish lady, the owner of considerable real and personal estate, which, however, he had settled upon her before marriage; and that he, Kennedy himself, had "acquired an imperfect title to a considerable amount of real estate." And by turning to one of the exhibits annexed to and made a part of the bill, it will be found that, on the 6th of May, 1814, he had acquired, along with his brother, a certain Spanish grant made to one McVoy, and in his own name two other Spanish grants, made to one Price and one Baudain. By the chancellor's decree in the suit by his heirs

against the heirs of his brother Joshua, among the exhibits, the same thing is established. The decree also declares, that he had the reputation of being a physician of some eminence; that he was fond of ease, careless of wealth, and generous; and that, after the death of his wife, he went to live with his brother, depending upon him for every thing, although he had means enough of his own. Having discovered his residence, it would have been but reasonable diligence to have taken the means to ascertain his ability to pay, and to have enforced the judgment against him.

How long Dr. Kennedy lived under the dominion of Spain will best be shown by a reference to the historical facts connected with that part of the country where he lived. From the treaty for the cession of Louisiana, the United States claimed the Perdido as the eastern boundary of that cession. In 1810, Mr. Madison, by his proclamation, declared it a part of the United States. And by an act of Congress of 14th May, 1812, all that portion of country lying east of Pearl River, west of the Perdido, and south of the thirty-first degree of latitude, was annexed to the Territory of Mississippi, embracing the city of Mobile. And on the 12th of February, 1813, Congress passed an act authorizing the President to take possession of the same. In the same year, the Spanish officers finally *retired. At this date, therefore, Dr. [*216 Kennedy ceased to be under the dominion of Spain, and became subject to the laws of the Territory of Mississippi, and liable to be sued in her courts. In 1817 the Territory of Alabama was created, and in 1819 it was admitted as a state into the Union. As to the deed made by Dr. Kennedy to his brother Joshua, in 1824, the exhibits show the object for which it was made. There is no charge of fraud against Dr. Kennedy in the bill, for acting as he did. The decree of the chancellor shows the reasons and motives in which the deed originated; and that it was secret is contradicted by the same decree, which says, that, "very soon after the deed was executed, Joshua Kennedy declared to many of those very friends whom he had consulted before, and to others at various times, that he had succeeded in his purpose; that the Doctor had made over his property to him, and that now his, the Doctor's, children would have plenty; that they would soon be rich." The decree also shows, that, in the spring of 1829, Joshua caused an advertisement to be inserted in a public newspaper in Mobile, offering for sale and lease, some of the lands, in which, speaking of the land to be leased, he states,—"At the expiration of which period, the property shall revert to the

legal heirs and representatives of William E. Kennedy deceased, and to the undersigned in equal proportions."

One portion of the lands conveyed by that deed — the McVoy claim—was, as appears by the deed itself, acquired by Dr. Kennedy in 1814, when, beyond all question, the country was part of the United States, and when there could have been no impediment to the acquisition of the property by Joshua in his own name. But what is still more remarkable, the conveyance was made to the two brothers jointly. As to the other claim, the chancellor says:—"Whether Joshua Kennedy originally had any interest on the Price claim or not, does not seem to be clear from the evidence; but about the year 1818 or 1819 there seems to have been a deed of partition, which is now lost, by which an equal interest on that claim was recognized between the brothers."

The bill is full of contradictions. In one place it admits that Dr. Kennedy's residence in Mobile was discovered in 1822, whilst it says in another that it was not until after the deed of 1824. It says in one place that Joshua, who became the administrator of his brother, never settled the estate, and in consequence the personal assets remained in his hands at the time of his death; whilst in another, exactly the contrary is stated.

*217] It will be observed there is no allegation in the bill, that *either the complainant or his predecessor ever presented this claim to Joshua as administrator, or took any measures to enforce payment out of the personal estate, which, by the laws of Alabama, required to be exhausted before resort can be had to the realty. And there is no charge of fraud whatever, either against Dr. Kennedy or his heirs, but that its whole scope and tendency is to offer excuses for the delay and neglect of the complainant and his predecessor. No exemplification of the judgment was produced.

The defendants have demurred to the bill, and under the state of facts apparent on its face and in the exhibits, it is contended that the claim is barred by lapse of time. In South Carolina, the payment of a judgment is presumed after the lapse of twenty years. This is the common law presumption, and is the rule in most of the states of the confederacy. In the state of Alabama, the statute of limitations bars domestic judgments in twenty years. Nothing is said as to judgments of sister states. It cannot be pretended they should be placed on a better footing than domestic. The bill admits a knowledge of the residence of Dr. Kennedy for a period of seven or eight years in Georgia, immediately after the judgment was obtained; and also a knowledge of his residence,

and that of his administrator and heirs, in Alabama, from 1822; so that the complainant has slept upon his rights for a period of more than thirty years, even if the time during which it is alleged the residence of Dr. Kennedy was unknown is deducted. The fact, that a creditor is ignorant of the domicile of his debtor, is not regarded in the courts of the country where the debtor resides; they make no presumptions in favor of strangers. The highest effort of legal comity is to place the stranger in the same situation as the citizen. Statutes of limitation and presumptions arising from lapse of time belong to the *lex fori*. The citizen of another state is not to be placed on a better footing than citizens of the state where suit is brought. *McElmoyle* v. *Cohen*, 13 Pet., 327.

The well-recognized doctrine of courts of equity, as to the effect of lapse of time in barring judgments and other claims, as well in analogy to statutes of limitation as where no such statutes exist, will be found laid down in 2 Story Eq., § 1520; and by this court in *McKnight* v. *Taylor*, 1 How., 167; and in *Bowman* v. *Wathen*, Id., 189. See, also, *Cholmondeley* v. *Clinton*, 2 Jac. & W., 141, 151; *Foster* v. *Hodgson*, 19 Ves., 184, 186; *Smith* v. *Clay*, Amb., 645; *Carr* v. *Chapman*, 5 Leigh (Va.), 164; *Hayes* v. *Goode*, 7 Id., 452.

The objection of lapse of time, apparent on the face of the *bill, may be taken on demurrer. Story Eq. Pl., §§ 484, 503, 751, and cases there cited. Where there is no relief, there is no discovery. *McClanahan* v. *Davis*, decided at the present term. [*218

Mr. Bibb, for the appellant, in reply, laid down the following propositions:—

I. The frame of the bill, and the equity thereof, apart from the length of time or the statute of limitations.

II. That the statute of limitations of Alabama does not apply to the case.

III. That the length of time, when no statute of limitations can be applied as a positive bar, and when compared with the facts stated in the bill and confessed by the demurrer, is no bar to the discovery and relief prayed.

Upon the first head, *Mr. Bibb* proceeded to show that, upon the averments of the bill, confessed by the demurrer, the appellant was without remedy at common law; but although the remedy was gone, the right remained.

Upon the second point, he relied upon the argument of *Mr. Dargan*.

Upon the third point, he contended that length of time, without any statute of limitation, was no reason for a demurrer

In this case it admitted all the causes stated in the bill, why the judgment was still unsatisfied. 3 Bro. Ch., 646; 3 Atk., 225; 2 Ves. Sr.,109.

Mr. Chief Justice TANEY delivered the opinion of the court.

The facts stated in the bill are admitted by the demurrer, and the only question is whether the complainant is entitled to relief in a court of equity, when so many years have elapsed, since the judgment was obtained against the father of the defendants.

The judgment was rendered in South Carolina on the 10th of November, 1797, and this bill was filed against the appellees in Alabama on the 22d of February, 1844. A period of more than forty-six years had therefore elapsed, during which neither the plaintiff who obtained the judgment, nor his administrator, nor the present complainant, who is administrator *de bonis non*, made a demand of the debt, or took any step to procure its payment.

It is not alleged in excuse for this delay, that his residence was, during all the time, unknown. On the contrary, it is admitted that it was known for some six or eight years after the judgment was obtained; and although he was afterwards lost *sight of for a long time, and supposed to *219] have gone beyond sea and died in parts unknown, yet he was again discovered in 1822 residing in the state of Alabama, where for three years afterwards he was accessible to the creditor, and amenable to judicial process.

Neither is it alleged that he designedly and fraudulently concealed his place of residence from the creditor; nor that the conveyance of his property was made for the purpose of hindering or preventing the recovery of this debt. The delay is accounted for and sought to be excused altogether upon the ground, that, when his place of residence was known, he was always in a state of poverty and insolvency, which made it useless to proceed against him.

It is, however, not necessary, in deciding the case, to inquire whether even this state of poverty would justify the delay of so many years without some demand upon the party, or some proceeding on the judgment, to show that it was still regarded as a subsisting debt, and intended to be enforced whenever the debtor was able to pay. The facts stated in the bill, and those which appear in the exhibits filed with it by the complainant, do not show this continued condition of utter destitution and want which the complainant relies upon. For when he was discovered in 1822, in Alabama, his situation as

to property was such as to make it highly probable that the debt might then have been recovered by an action at law,—if it was not already barred by the act of limitations of that state.

This appears from the decree of the Chancery Court of the state, in a controversy between the heirs of William E. Kennedy, the debtor, and the heirs of his brother Joshua, which decree is one of the complainant's exhibits. It shows that in 1818 or 1819 the debtor held in his own right an undivided moiety of the real estate, which he conveyed to his brother, Joshua Kennedy, in 1824, as mentioned in the bill. And this conveyance upon the face of it purported to be in consideration of the sum of $10,000; a sum sufficient to pay the principal of the judgment, and a large portion of the interest. It is true that the complainant, in that part of the bill in which he speaks of this conveyance, states that he did not discover that the debtor was living and residing at Mobile until after the conveyance was made. If this allegation was consistent with the other statements in the bill, and could be regarded as a fact in the case, admitted by the demurrer, still, as he died in 1825, reasonable diligence required that the creditor should have taken some measures to ascertain whether the $10,000 had been paid; and to compel his administrator, who was also the grantee *in the deed, to account [*220
for it. The creditor had no right to presume, without inquiry, that his debtor, who had sold property for so large a sum of money, had within a year afterwards died utterly insolvent and almost penniless, so as to make it useless to investigate the state of his affairs, or to take any step towards the recovery of his debt. There is reason for believing, from the facts stated in the decree above mentioned, that, with proper efforts, he would at that time have learned the trust upon which the conveyance was made, and discovered that the debtor had left property of sufficient value to be at all events worth pursuing.

But the complainant cannot put his claim upon the ground that the residence of the debtor was not known until after he had made the conveyance and parted from this property. For in a previous part of his bill he admits that this information was obtained in 1822, which was two years before the deed was executed. And whatever might have been the wasteful and dissolute habits of the debtor, he yet at that time owned the land which at this late period the complainant is seeking to charge with this debt; and continued to hold it until the conveyance to his brother in 1824. And if the creditor chose to rest satisfied with information as to his habits and manner

of living, instead of using proper exertions to find out his situation as to property, his want of knowledge in this respect was the fruit of his own laches. The fact that he held the title to these lands could undoubtedly have been ascertained with ordinary exertions on his part. And he moreover might have learned, according to the statement in his exhibit before referred to, that after the death of Wm. E. Kennedy, his brother, the grantee in the deed frequently spoke of this conveyance as intended merely to prevent the property from being wasted by the careless habits of his brother, and to preserve it for his family. And as late as 1829, in an advertisement in a newspaper of the place, offering some of this land for sale or lease, he described it as property of which the children of Wm. E. Kennedy were entitled to one half. With all these means of information open to him from 1822 to 1829, the creditor cannot be permitted to excuse his delay in instituting proceedings upon the ground that he supposed the debtor to have lived and died hopelessly insolvent, until he obtained information to the contrary about the time this bill was filed. If he remained ignorant, it was because he neglected to inquire. If he has lost his remedy at law by lapse of time, or the death of the debtor, it has been lost by his own laches, or that of the administrator who preceded him.

*221] *It is the established rule in a court of equity, that the creditor who claims its aid must show that he has used reasonable diligence to recover his debt, and that the difficulties in his way at law have not been occasioned by his own neglect. A delay of twenty years is considered an absolute bar in a court of equity, unless it is satisfactorily accounted for. But here there has been a delay of more than forty-six years; and under circumstances, for a part of that time, which evidently show a want of diligence.

Indeed, if the court granted the relief asked for, the complainant would not only be protected from the consequences of his own neglect, but would derive a positive advantage from it. For if, when the debtor was discovered in Alabama in 1822, the complainant had then brought an action at law against him and recovered judgment, and then suffered that judgment to sleep until the time when this bill was filed, his claim would have been barred by the statute of limitations of that state. And if he could now avoid that bar, upon the ground that the act of limitations of Alabama applies only to domestic judgments, and could obtain the aid of a court of equity to enforce the judgment rendered in South Carolina, upon the ground that it is not within that act, he would derive an advantage from his omission to proceed against the debtor

when he discovered, in 1822, the place of his residence. He would obtain relief, because he neglected to sue at law when the debtor appears to have been in a condition to pay the debt; and when that fact could have been ascertained by reasonable exertions on his part. In the eye of a court of equity, laches upon a judgment of South Carolina cannot be entitled to more favor than laches upon a judgment in Alabama, and both must be visited with the same consequences. Relief in a court of equity, under the circumstances stated in the bill and exhibits, would be an encouragement to revive stale demands, which had been abandoned for years. The property now sought to be charged might not, in the lifetime of the original parties, have been thought worth pursuing; and in the changes in value continually occurring in this country, it may, after the lapse of so many years, have become of great value in the hands of the heirs of the debtor. And if under such circumstances it could be made liable, an old and abandoned claim, with the accumulated interest of near half a century, might become a tempting speculation. Sound policy, as well as the principles of justice, requires that such claims should not be encouraged in a court of equity.

It is unnecessary, in this view of the case, to determine whether the statute of limitations of Alabama does or does not *apply to this judgment. For the reasons above stated, we think the lapse of time, upon the facts stated in the bill and exhibits, is, upon principles of equity, a bar to the relief prayed, without reference to the direct bar of a statute of limitations. [*222

Another question has been made in this case; and that is, whether the objection arising from lapse of time, apparent on the bill and exhibits, can be taken advantage of on demurrer. Undoubtedly the rule formerly was that it could not; and that doctrine was distinctly laid down by Lord Thurlow, in the case of *Deloraine* v. *Browne*, 3 Bro. Ch. R., 646. The rule was perhaps followed for some time afterwards. It was placed upon the ground, that this defence was founded upon the presumption that the debt must have been paid, and as a demurrer admits the fact stated in the bill, it admits that the debt is still due; and if admitted to be due, the debtor in equity and good conscience is bound to pay it.

But the presumption of payment is not the only ground upon which a court of chancery refuses its aid to a stale demand. For there must appear to have been reasonable diligence, as well as good faith, to call its powers into action; and if either is wanting, it will remain passive and refuse its aid. This is the principle recognized by this court in

Piatt v. *Vattier*, 9 Pet., 416; *McKnight* v. *Taylor*, 1 How., 168; and in *Bowman et al.* v. *Wathen et al.*, Id., 189. If, therefore, the complainant by his own showing has been guilty of laches, he is not entitled to the aid of the court, although the debt may be still unpaid.

Upon this principle, the proper rule of pleading would seem to be, that, when the case stated by the bill appears to be one in which a court of equity will refuse its aid, the defendant should be permitted to resist it by demurrer. And as the laches of the complainant in the assertion of his claim is a bar in equity, if that objection is apparent on the bill itself, there can be no good reason for requiring a plea or answer to bring it to the notice of the court. Accordingly, the rule stated by Lord Thurlow has not been always followed in later cases. In *Hovenden* v. *Annesley*, 2 Sch. & Lefr., 638, Lord Redesdale says,—"If the case of the plaintiff as stated in the bill will not entitle him to a decree, the judgment of the court may be required on demurrer whether the defendant ought to be compelled to answer the bill." And in Story's Eq. Pl., § 503, and the note to it, he states the rule laid down by Lord Redesdale to be now the established one. In the opinion of the court, it is the true rule.[1] It is evidently founded upon sounder principles of reason than the one maintained by Lord Thurlow, and is better calculated to disembarrass a suit from unnecessary forms and technicalities, and to save the parties from useless expense and trouble in bringing it to issue, and applies with equal force to a case barred by the lapse of time, and the negligence of the complainant, as to one barred by a positive act of limitations. In the case before us, therefore, the demurrer was proper, and must be sustained, and the decree of the court below affirmed.

*223] *

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

[1] CITED. *Landsdale* v. *Smith*, 16 Otto, 392-8.

SAMUEL MARSH, WILLIAM E. LEE, AND EDWARD C. DELAVAN, PLAINTIFFS IN ERROR, *v.* EDWARD BROOKS AND VIRGINIA C., HIS WIFE, FORMERLY VIRGINIA C. REDDICK, CHARLES P. BILLOU AND FRANCES E., HIS WIFE, FORMERLY FRANCES E. REDDICK, WALTER J. REDDICK AND DABNEY C. REDDICK BY ELIZA M. REDDICK, THEIR GUARDIAN, HEIRS AT LAW OF THOMAS F. REDDICK, DECEASED, DEFENDANTS IN ERROR.[1]

The plaintiff in a writ of right produced a patent from the United States, dated in 1839, which contained sundry recitals, referring to titles of anterior date derived from acts of Congress for the adjustment of claims to lands. But the patent itself was issued under an act of Congress in 1836.

The defendant, in order to show an outstanding title, gave in evidence a treaty between the United States and the Sac and Fox Indians, in which this, with other lands, was reserved for the half-breeds, and an act of Congress passed in 1834 relinquishing the reversionary interest of the United States to these half-breeds.

This was sufficient to show an outstanding title.

The recitals in a patent are not enough to show that the title is of an earlier date than the patent itself, although they are evidence for some purposes. Nor was it necessary for the defendant to show that any of the half-breeds were in existence at the time of the trial.[2]

THIS case was brought up, by writ of error, from the Supreme Court of Iowa. It was a proceeding in the nature of an ejectment, to recover 640 acres on the right bank of the Mississippi River. The suit was brought by the heirs of Reddick against one Kilbourn, who was the tenant in possession. By agreement of counsel filed after the suit was brought, it was admitted that the defendants in error were the heirs of Thomas F. Reddick, and the plaintiffs in error were substituted in the place of Kilbourn.

*The facts were these:

On the 4th of August, 1824, a treaty was made be- [*224
tween the United States and the Sac and Fox Indians, by the first article of which the Indians ceded to the United States the lands described as follows, viz.:—"Within the limits of the state of Missouri, which are situated, lying, and being between the Mississippi and Missouri Rivers, and a line running from the Missouri at the entrance of Kansas River north one hundred miles to the northwest corner of the state of Missouri, and from thence east to the Mississippi. It being understood, that the small tract of land lying between the rivers Des Moines and the Mississippi, and the section of the above

[1] Further decision, 14 How., 513.

[2] CITED. *Bryan* v. *Shirley et al.* 53 Tex., 459.

line between the Mississippi and Des Moines, is intended for the use of the half-breeds belonging to the Sac and Fox nations, they holding it, however, by the same title and in the same manner that other Indian titles are held."

On the 30th June, 1834, Congress passed an act (4 Stat. at L., 740,) entitled, "An act relinquishing the half-breed lands." It relinquished all the right, title, and interest which might accrue to the United States in the above reservation, and vested the land between the rivers Des Moines and Mississippi, above mentioned, in the half-breeds of the Sac and Fox tribes of Indians, who were, at the passage of the act, entitled by the Indian title to the same, with full power and authority to transfer their portions thereof, by sale, devise, or descent, according to the laws of the state of Missouri.

Both of these documents covered the land in dispute.

On the 1st of July, 1836, Congress passed an act, (6 Stat. at L., 661,) relinquishing to the heirs of Thomas F. Reddick all the right, title, claim, and interest which the United States had to a certain tract of land (understood to be the land in dispute), with the following proviso:—

"Provided, nevertheless, if said lands shall be taken by any older or better claim not emanating from the United States, the government will not be in any wise responsible for any remuneration to said heirs; and, provided, also, that, should said tract of land be included in any reservation heretofore made, under treaty with any Indian tribe, that the said heirs be, and they hereby are, authorized to locate the same quantity in legal sub-divisions on any unappropriated land of the United States in said territory, subject to entry at private sale."

On the 7th of February, 1839, a patent was issued by the United States to Thomas F. Reddick, for the land in controversy, which contained the following recital, viz.:—

*225] *"The United States of America, to all to whom these presents shall come, greeting:

"Know ye, that Thomas F. Reddick, assignee of the estate of Joseph Robidoux, assignee of Louis Honore Tesson, has deposited in the General Land Office, a certificate numbered one thousand one hundred and fifty-seven, of the recorder of land titles at St. Louis, Missouri, whereby it appears that, in pursuance of the several acts of Congress for the adjustment of titles and claims to lands, the said Thomas F. Reddick, assignee of the estate of Joseph Robidoux, assignee of Louis Honore Tesson, has been confirmed in his claim to a tract of

land containing six hundred and forty acres, bounded and described as follows, to wit," &c., &c.

On the 10th of July, 1839, the defendants in error brought a writ of right (a proceeding recognized by the statutes of Iowa, in the nature of an ejectment) against the tenant in possession under Marsh, Lee, and Delavan. After sundry proceedings, which it is not necessary to state, the cause came on for trial at September term, 1848, of the District Court, when the jury, under the instructions of the court, found a verdict for the plaintiffs.

A bill of exceptions was taken, which set out the evidence offered by the parties respectively, as follows, viz.:—

The plaintiffs offered in evidence the above patent; proved that the land claimed was included within it; the heirship of the plaintiffs; and that the defendant was in possession when the suit was brought, and then vested.

The defendants, in order to prove an outstanding title, offered in evidence,—

1. The treaty of 1824.
2. The Act of Congress of June 30, 1834.
3. The Act of Congress of July 1, 1836.

And also offered parol testimony to prove that the northern line of said half-breed reservation was an actually marked line, in accordance with said plat, and called by the neighborhood, along and on each side of said line, the half-breed line; and thereupon prayed the court to instruct the jury as follows, to wit:—

Refused.

1st. That if the jury believe, from the evidence, that the land described in the patent lies within the reservation for the Sac and Fox half-breeds, then the plaintiffs are not entitled to recover under said patent, as authorized by the said act of 1st of July, 1836.

* *Given.* [*226

2d. That under the report of the recorder of land titles, dated February 2d, 1816, offered by plaintiffs in evidence, plaintiffs are not entitled to recover, unless the same has been confirmed by an act of Congress.

Given.

3d. That the true construction of the act of 29th of April, 1816, does not confirm the plaintiffs' title to the land sued for in this action, if the Indian title was not then extinguished in said land.

Given.

4th. That the treaty of 1824, with the Sac and Fox Indians, is a recognition by the United States of the Indian title to the land in controversy at the date of said treaty of 1824.

Refused.

5th. That if the jury believe, from the evidence, that the land described in the patent lies within the reservation for the Sac and Fox half-breeds, then the plaintiffs are not entitled to recover under said patent.

Given.

6th. That if the jury find for the plaintiffs, and that said plaintiffs are entitled to damages from defendants for withholding or using or injuring their property, the jury shall then set off the value of any permanent improvements defendants may have made on said land, at their fair value, against said damages.

Refused.

7th. That the plaintiffs cannot recover in this action, unless they show conclusively that the land in controversy is not within the Sac and Fox half-breed reservation.

Given.

8th. Instruct the jury, that, when it is proved that the land claimed by Reddick's heirs was within the bounds of the map given in evidence in this case, as a survey of the half-breed tract, and that it has proved that such a line does exist, and is recognized by persons residing on each side of the line as the true north line of said tract, that no reputation or opinion of the citizens residing south of said line, or north of said line, that said line is incorrect, would be evidence to impeach the correctness of the line on the map, and proved to actually exist.

Given.

9th. That if the jury believe that Honore Tesson had no marked or known boundaries, which included the land in controversy, the jury must find for the defendant.

*227] The first, fifth, and seventh of which instructions the court *refused to give to the jury; to which refusal and opinion of the court the defendants, by their counsel, except, and pray that this their bill of exceptions may be signed, sealed, and made a part of the record.

CHARLES MASON, *Judge*. [SEAL.]

The defendants sued out a writ of error, and carried the

case up to the Supreme Court of Iowa, which, on the 26th of January, 1846, affirmed the judgment of the District Court.

The defendants in the District Court, viz., Marsh, Lee, and Delavan, then brought the case, by writ of error, up to this court.

It was argued by *Mr. Wood*, for the plaintiffs in error, and *Mr. May* and *Mr. Geyer*, for the defendants.

Mr. Wood made the following points:—

I. The possession of the defendants in the original suit was sufficient to entitle them to a verdict, unless the plaintiffs should show a title.

II. An outstanding valid title, paramount to that of said plaintiffs, was sufficient to protect the possession of defendants below against the plaintiffs' title. *Schauber* v. *Jackson*, 2 Wend., 12.

III. The title of the Indian half-breeds, under the act of 1834 and the treaty of 1824, was valid and complete, and being prior in time to the patent of the plaintiffs of 1839, which issued in virtue of the act of 1836, is paramount thereto, and ought to prevail against it. 1 Doug. (Mich.), 555; *Hoofnagle v. Anderson*, 7 Wheat., 212; 2 Pet., 263; 9 Wheat., 673; 9 Pet., 715, 716.

IV. Even if the plaintiffs below had shown a defective title prior to the treaty of 1824, such defective title would not, as against the said title under the act of 1834, be made valid by the plaintiffs' patent of 1839, because such patent passed only the title of the United States, then existing; more especially, inasmuch as the act of 1836, under which it issued, reserved rights previously acquired under treaty with any Indian tribe. *Lee v. Glover*, 8 Cow. (N. Y.), 189; *Mitchel* v. *United States*, 9 Pet., 748; *Johnson* v. *McIntosh*, 8 Wheat., 578.

The counsel for the defendants in error contended,—

I. The court did not err in refusing the said prayers, because,—

1. They are based on a part only of the evidence. *Greenleaf's Lessee* v. *Birth*, 9 Pet. 292.

*2. It appears on the plot, by the prayers of plaintiffs in error, and on the face of the patent, that the land in dispute had been, by acts of Congress, confirmed to Reddick prior to the treaty of August, 1824. [*228

The patent being founded on a confirmation, the facts recited may be considered. *United States* v. *Clarke*, 8 Pet., 448. A public grant, if admitted in evidence, must be

received by court and jury as evidence both of the facts it recites and declares leading to the foundation of the grant, and all other facts legally inferable by either from what is so apparent on its face. *United States* v. *Arredondo*, 6 Pet., 729. See Act of March 2d, 1805, ch. 26 (2 Stat. at L., 324); Act of April 21st, 1806, ch. 39 (2 Id., 391); Act of February 15th, 1811, ch. 14 (2 Id., 617); Act of June 13th, 1812, ch. 99, (2 Id., 748,) authorizing Recorder to report on claims to land in Missouri; Reports of Recorder of November 1st, 1815, and February 2d, 1816, in favor of Reddick's claim; 3 Am. State Papers, 345; Act confirming Claims reported by Recorder, April 29th, 1816, ch. 159 (3 Stat. at L., 328).

The report of recorder adds to his approval of Reddick's claim "if Indian right extinguished." As to the effect of this proviso, see Report of J. M. Clayton, Chairman 23d Congress, 2d Sess. Report, No. 31, Ho. Reps.; *United States* v. *Fernandez et al.*, 10 Pet., 303; *Chouteau* v. *Eckhart*, 2 How., 374; Report of Solicitor of Land Office, MSS. vol., No. 75, dated June 9, 1837.

Did not the act of April 29th, 1816, include Reddick's claim?

It was approved by the recorder, acting as commissioner, as a valid claim, subject only to Indian rights, on the contingency that they are or may thereafter be extinguished. "All grants of land by the government are to be understood as being subject to Indian rights." *Fletcher* v. *Peck*, 6 Cranch, 87; *Mitchel* v. *United States*, 9 Pet., 711; *Johnson* v. *McIntosh*, 8 Wheat., 574.

If, before the confirmation to Reddick, the title was only inchoate and addressed itself to the political departments of government, (see *Le Bois* v. *Bramell*, 4 How., 449,) yet it was such an equitable title as the government was bound to protect. *Mitchel et al.* v. *United States*, 9 Pet., 714.

But what was the effect of the confirmation by the act of April 29th, 1816, if restricted by the proviso of the recorder, to wit, "if Indian right extinguished." Did it not at least grant the ultimate fee, which was in the United States, subject to Indian right of possession? Could the United States afterwards *deal with the fee, and reserve or in any way dispose of it? *Mitchel et al.* v. *United States*, 9 Pet., 718; *Grignon* v. *Astor*, 2 How., 344.

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Indians have only a right of occupancy, and no power to dispose of the soil. *Johnson* v. *McIntosh*, 8 Wheat., 543 Indians cannot sue on their aboriginal title in courts of the United States. *Cherokee Nation* v. *Georgia*, 5 Pet., 20.

Grants of land by the government are to be understood to convey a title to the grantees, subject only to the Indian right of occupancy. When that is ended by cession to the government, or otherwise, it is to be enjoyed in full dominion by the grantee. Id.; *Fletcher* v. *Peck*, 6 Cranch, 87; *Mitchel* v. *United States*, 9 Pet., 711; *United States* v. *Fernandez*, 10 Pet., 304.

The act confirming Reddick's title was passed in 1816. After this, by the treaty of August, 1824, the Indians cede all their title, reserving only a small tract for the use of their half-breeds, they holding it as "other Indian titles are held." Reddick's land was located before this, and well known to the government by its metes and bounds. See additional article of Treaty with Sac and Fox Indians, dated November 3d, 1804 (7 Stat at L., 87).

Was not the reservation subject, then, to his locations? Otherwise would it not be a fraud on the part of the United States?

The confirmation of the claim of Reddick, either by the recorder or Congress, was a location of the land. *Les Bois* v. *Bramell*, 4 How., 463.

The grant, then, by act of April 29th, 1816, is *primâ facie*, a good legal title, and standing alone will support an ejectment. *Strother* v. *Lucas*, 12 Pet., 454; *Chouteau* v. *Eckhart*, 2 How., 372. It is a higher evidence of title than a patent, and is a direct grant of the fee. *Grignon* v. *Astor*, 2 How., 344.

But the plaintiffs below relied upon their patent, issued 7th February, 1839. It is the superior and conclusive evidence of legal title. *Bagnell* v. *Broderick*, 13 Pet., 436; *Wilcox* v. *Jackson*, Id., 499. It is conclusive proof that the act of granting is by authority of the United States. *United States* v. *Arredondo*, 6 Pet., 728; *Patterson* v. *Winn*, 5 Id., 241. And is evidence that every prerequisite has been performed. *United States* v. *Arredondo*, 6 Pet., 730, 731; *Polk* v. *Wendal*, 9 Cranch, 87.

It will not be presumed that the government has conveyed the same land twice. *United States* v. *Arredondo*, 6 Pet., 691.

The court will not construe the patent as conflicting with other rights. *Ib.*

*The patent is *primâ facie* evidence of title, and also that any former grant of the same land by the government was extinguished. *Hall* v. *Gittings's Lessee*, 2 Harr. & J. (Md.), 112. [*230

This court has repeatedly decided that at law no facts behind the patent can be investigated. *Boardman et al.* v. *Lessees of Reed and Ford*, 6 Pet., 328, 342; *Stringer* v. *Young*, 3 Id., 320.

But it ought to be presumed, in cases of disputes about lands granted by government on Indian titles, that a patent carefully describing the lands does not interfere with other public grants, or specially with Indian reservations.

Intercourse with the Indians should be carried on by the government. *Worcester* v. *State of Georgia*, 6 Pet., 315.

It is for the officers of government to say when land shall be reserved, and what is so reserved. Indian affairs belong to the political department. The United States deal with Indian titles in their political and sovereign capacity. It is for the land officers to decide on facts on which a patent is to issue. *Cherokee Nation* v. *Georgia*, 5 Pet., 1; *Wilcox* v. *Jackson*, 18 Id., 499; *Les Bois* v. *Bramell*, 4 How., 461.

Though grants are subject to Indian title, yet it is for the proper officers of government to say when such title is extinct by succession, or abandonment, by boundary, or rejection of claim, and the lands have reverted to public fund. *United States* v. *Arredondo*, 6 Pet., 747, 748.

The officers of government have determined that the Indian right was extinguished to Reddick's claim, if the act of April 29, 1816, had not already so determined; and, by issuing the patent, have at least put the burden of proving the contrary on those who dispute it. *United States* v. *Arredondo*, 6 Pet., 727, 728; *Strother* v. *Lucas*, 12 Id., 437; 3 State papers; Report of Solicitor of the Land Office, MSS. vol., No. 113, dated September 21, 1837; also No. 209, dated October 30, 1838; Opinion of Attorney-General Grundy, dated January 2, 1839, Vol. of "Opinions of Attorneys-General," p. 1230; Order of Secretary Woodbury, dated February 6, 1839, to issue patent to Reddick's heirs, "by command of the President without any further suspension," and order of Commissioner of Land Office in pursuance thereof (on the files of Land Office).

Presumptions are in favor of the integrity and fidelity of public officers in fulfilling their duties. *Bank of the United States* v. *Dandridge*, 12 Wheat., 64; *Martin* v. *Mott*, Id., 19; Bull. N. P., 298; 1 Green. on Ev., § 40.

If the patent is *primâ facie* evidence, and is not rebutted, it remains sufficient to maintain the title. *Kelly* v. *Jackson*, 6 Pet., 632.

*231] *II. The outstanding title set up by the plaintiffs in error in the court below, under the treaty and law of June 30, 1834, does not necessarily negative a title in the United States at the date of the patent.

It must be a clear subsisting title outstanding in another, to defeat a plaintiff in ejectment, and that means such a title

as the stranger could recover on in ejectment against either of the contending parties. *Hall* v. *Gittings's Lessee*, 2 Harr. & J. (Md.), 112.

III. The act of June, 1834, does not necessarily include in the half-breed reservations the land in dispute.

IV. The burden of showing that there was no title in the United States at the date of the patent, and also that the land is within the half-breed reservation, was upon the plaintiffs in error (defendants below). *Greenleaf* v. *Birth*, 6 Pet., 302; *Hawkins* v. *Barney*, 5 Id., 468, 469.

Mr. Justice CATRON delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of Iowa. The suit originated in a writ of right issued by the District Court of Lee County, at the instance of the heirs of T. F. Reddick, to recover possession of certain lands wrongfully withheld from them, as they alleged, by the defendants, Marsh and others. The venue was subsequently changed to the county of Henry, where the cause was tried in September, 1843. The plaintiffs claimed possession, as owners, under a patent to their ancestor, signed by the President and issued from the General Land Office on the 7th of February, 1839, which they exhibited, and also proved the premises in question to be covered by such patent, and in possession of defendants.

The defendants produced in evidence,—1st. An act passed by Congress on the 1st of July, 1836, relinquishing to the heirs of T. F. Reddick the right and interest of the United States in six hundred and forty acres, being the land in controversy; which act contained the following provisos:—"Provided, nevertheless, if said lands shall be taken by any older or better claim, emanating from the United States, the government will not be in any wise responsible for any remuneration to said heirs; and provided, also, that should said tract of land be included in any reservation heretofore made under treaty with any Indian tribe, the said heirs be, and they hereby are, authorized to locate the same quantity, in legal subdivisions, on any unappropriated lands in said territory subject to entry at private sale." 2d. The treaty of August 4, 1824, between the United States and the Sac and Fox Indians, and a plat showing the *premises in question to be within the limits of a tract reserved by said treaty for the half-breeds belonging to the Sac and Fox nations. 3d. The act of June 30, 1834, relinquishing the reversionary or contingent interest of the United States in the reservation above mentioned to the half-breeds, and authorizing them to [*232

sell and convey the same. The defendants then requested the court to give to the jury several instructions; the first, fifth, and seventh of which were as follows:—

"1st. That if the jury believe from the evidence, that the land described in the patent lies within the reservation for the Sac and Fox half-breeds, then the plaintiffs are not entitled to recover under said patent, as authorized by the act of 1st June, 1836."

The fifth is to the same effect as the first.

"7th. That the plaintiffs cannot recover in this action, unless they show conclusively that the land in controversy is not within the Sac and Fox half-breed reservation."

The court refused to charge the jury upon the above-mentioned points as requested, and a verdict was rendered for the plaintiffs; whereupon the case was carried by the defendants to the Supreme Court of Iowa, where the judgment of the District Court was affirmed.

From the foregoing statement it appears that, by refusing to give the first, fifth, and seventh instructions, the court below decided that the patent obtained from the United States by Reddick's heirs was a better title than the reservation to the Sac and Fox half-breeds.

The patent of 1839, was, *primâ facie*, a conclusive title; but by the treaty of 1824, with the Sac and Fox Indians, the land in dispute was admitted by the United States to lie within the territory ceded by the treaty; and the Indian title, such as it was before the treaty, is reserved to the half-breeds. This Indian title consisted of the usufruct and right of occupancy and enjoyment; and, so long as it continued, was superior to and excluded those claiming the reserved lands by patents made subsequent to the ratification of the treaty; they could not disturb the occupants under the Indian title. That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question. This is the result of the decision in *Johnson* v. *McIntosh*, 8 Wheat., 574, and was the question directly decided, in the case of *Cornet* v. *Winton*, 2 Yerg. (Tenn.), 143, on the effect of reserves to individual Indians of a mile square each, secured to heads of families by the Cherokee treaties of 1817 and 1819. Here, however, in addition to the reserved Indian right, the act of 1834 vests the ultimate *title remaining to the United States in the half-breeds of the Sac and Fox tribes; thereby giving them a perfect fee-simple. And this act of 1834, being older than the patent, must prevail, unless the plaintiffs below can go behind their patent; and on this assumption the controversy has been made to turn. No evi-

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dence of title was introduced in the District Court other than the patent itself; and its recitals are relied on to overreach the half-breed title. In the argument here, reports found in Congressional documents, and laws passed by Congress operating on such reports and document, have been adduced and insisted on as confirming Reddick's claim, long before the treaty of 1824 was made. The patent recites that Reddick (assignee of Robidoux, who was assignee of Tesson) had deposited in the General Land Office a certificate (No. 1157) of the recorder of land titles at St. Louis, Missouri; and that, in pursuance of the several acts of Congress for the adjustment of titles and claims to land, said Reddick has been confirmed in his claim to a tract of land containing six hundred and forty acres, &c.

For the purpose of showing the consideration on which the patent is founded, and the authority by which it issued, the recitals are indisputable on a trial at law; but standing alone, they do not furnish sufficient evidence to establish that the title can take an earlier date than the patent, and thereby overreach an elder title, as that of the half-breeds. As another trial will probably bring out a different case from the one now presented to us, we refrain from making any further remarks on the extraneous matters adduced on the argument.

Nor can the act of 1836, in favor of Reddick's heirs, help the patent, it being of later date than the treaty; and the confirming act to the half-breeds is, of course, (when standing alone,) inferior to the Indian title.

It was also insisted on the argument here, that, as it did not appear that any half-breeds, or their heirs or assigns, were in existence when the trial below took place, the outstanding title relied on could not be set up by the defendants. To which it may be answered, that it was necessary for the plaintiffs to show themselves to be owners of the land, and to recover on the strength of their own title; and if the land had been previously granted, nothing was left to pass by the second patent, unless there had been an escheat, or forfeiture of title to the United States, by the first grantees; and certainly a court of justice could presume neither of these things to have taken place between 1834 and 1839, such being the respective dates of the confirming act to the half-breeds, and the patent of Reddick's heirs. The general rule is, [*234
that, where the same land has been *twice granted, the elder patent may be set up in defence by a trespasser, when sued by a claimant under the younger grant, without inquiring as to who is the actual owner of the land at the time of the trial.

It is therefore ordered, that the judgment be reversed, and the cause remanded for another trial to be had therein.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the territory of Iowa, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court; that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded for further proceedings to be had therein in conformity to the opinion of this court.

MOSES WANZER, PLAINTIFF IN ERROR, *v.* TULLIUS C. TUPPER AND JOHN H. ROLLINS, UNDER THE FIRM OF TUPPER & ROLLINS.

By the statutes of Mississippi, the holder of an inland bill of exchange is entitled to recover of an indorser the amount due on the bill, with interest, upon giving the customary proof of default and notice. A protest is necessary only for the purpose of enabling him to recover the five per cent. damages given by the act.
The case of *Batley* v. *Dozier* (6 How., 23) confirmed.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi.

It was an action brought by Wanzer upon a bill of exchange drawn by him upon Silverbury & Co., accepted by drawees, and indorsed by Tupper & Rollins to Wanzer.

The cause was tried in the Circuit Court in November, 1846, when the court refused to permit the bill, although admitted to be an inland bill of exchange, to be given in evidence to the jury, because there was no valid protest thereof.

It is unnecessary to state any further facts in the case.

It was argued in this court by *Mr. Coxe*, for the plaintiff in error, no counsel appearing for the defendants.

Mr. Chief Justice TANEY delivered the opinion of the court.

*235] In this case, the Circuit Court for the Southern District of *Mississippi decided, that the holder of an

inland bill of exchange drawn and accepted in that state was not entitled to recover against the indorser, unless the bill had been regularly protested for non-payment. This decision was made before the case of *Bailey* v. *Dozier*, reported in 6 How., 23, came before this court. In that case the court held, upon full consideration of the question, that, under the statute of Mississippi, the holder of an inland bill of exchange was entitled to recover of an indorser the amount due on the bill, with interest, upon giving the customary proof of default and notice; and that the protest was necessary only for the purpose of enabling him to recover the five per cent. damages given by the act. The case of *Bailey* v. *Dozier* must govern this, and the judgment in the Circuit Court is therefore reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

ELI CLARK, WILLIAM GREEN, AND HUGH MCGILL, PLAINTIFFS IN ERROR, *v.* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE MANUFACTURERS' INSURANCE COMPANY, DEFENDANTS.

Where an action was brought upon a policy of insurance against fire, by the assignees of the person originally insured, and in the policy it was said that it was "made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had," it was proper to prove by parol testimony that the representations alleged to have been made by the party originally insured were actually made by him.

And if the assignees, by their acts, adopted these representations, when renewing the policy from time to time, the evidence was equally admissible, because the subsequent policies had reference to the one first made.[1]

[1] An agreement to renew a policy of fire insurance, in the absence of evidence that any change was intended, implies that the terms of the existing policy are to be continued. *Hay* v. *Star Fire Ins. Co.*, 77 N. Y., 235, 239.

To constitute an application a part of a policy of fire insurance, there

Therefore, where the representation upon which the original policy was founded was, that "the picker is inside of the building, but no lamps used in the picking-room," it was a correct instruction to give to the jury, that the use of lamps in the picker-room rendered the policy void.[2]

But if no representations were made or asked, it would not be the duty of the insured to make known the fact that lamps were used in the picking-room, although the risk might have been thereby increased, unless the use of them in that way was unusual.[3]

*236] THIS case was brought up, by writ of error, from the Circuit *Court of the United States for the District of

must be some reference to it in the policy which evinces that the parties understood and accepted it as such. *Vilas* v. *New York Central Ins. Co.*, 72 N. Y., 590; *affirming* 9 Hun, 121.

[2] The misrepresentation or suppression of a fact material to the risk known to the insured, and which the insurer is not bound to know will, in general, avoid the policy. *Roth* v. *City Ins. Co.*, 6 McLean, 324; *Carpenter* v. *American Ins. Co.*, 1 Story, 57; *Bulkley* v. *Protection Ins. Co.*, 2 Paine, 82; *Prudhomme* v. *Salamander Fire Ins. Co.*, 27 La. Ann., 695; *Mers* v. *Franklin Ins. Co.*, 68 Mo., 127; *Whittle* v. *Farmville Ins. &c. Co.*, 3 Hughes, 421; *Mullin* v. *Vermont Mut. Fire Ins. Co.*, 54 Vt., 223. But where the misrepresentation or concealment relates to something immaterial to the risk, (*Mobile Fire Dept. Ins. Co.* v. *Coleman*, 58 Ga., 251; *Same* v. *Miller*, Id., 420); or respecting which the insurer is charged with notice, or is bound to inquire (*Kohne* v. *Ins. Co. of No. America*, 1 Wash. C. C., 93; s. c. Id., 158; *Nicoll* v. *American Ins. Co.*, 3 Woodb. & M., 530; *Andes Ins. Co.* v. *Fish*, 71 Ill., 620. But see *Texas Banking & Ins. Co.* v. *Hutchins*, 53 Tex., 61; s. c. 37 Am. Rep., 750; *Hansen* v. *American Ins. Co.*, 57 Iowa, 741) it will not avoid the policy.

If the representation is a mere expression of opinion by the assured, *e. g.* as to valuation, the insurer should inquire into the grounds of such opinion. *Classon* v. *Smith*, 3 Wash. C.C., 156; *Harrington* v. *Fitchburg Mut. Fire Ins. Co.*, 124 Mass., 126; *Citizens' Fire &c. Ins. Co.* v. *Short*, 62 Ind., 316; *Carson* v. *Jersey City Fire Ins. Co.*, 14 Vr. (N. J.). 300; s. c. 39 Am. Rep., 584. Thus a clerk of the agent of the insured stated to the agent of the company with whom the insurance was effected, that another company had accepted a risk on the premises sought to be insured in the defendant company. This statement was untrue. The clerk did not know it to be so, but his employer did. In an action upon the policy, the falsity of this statement was insisted upon as a defence. The judge instructed the jury that if the clerk made the statement absolutely as a fact, the policy was void; but if he stated it merely as a matter of opinion, the policy was valid. *Held*, correct. *Standard Oil Co.* v. *Amazon Ins. Co.*, 14 Hun (N. Y.), 619; s. c. 79 N. Y., 506.

A policy provided that the insurer should not be liable for loss occasioned by the use of kerosene oil as a light in any barn or out-building. In an action upon the policy—*Held*, 1. That the condition was not simply a provision against the habitual use of the oil, but that its use upon a single occasion, if it caused a loss, *i. e.*, if loss would not have resulted if other oil had been used, forfeited the policy. 2. That the condition contemplated and provided against the danger resulting from the upsetting or breaking, by some intervening accident, of a lamp filled with the oil named, as well as to a direct and immediate effect therefrom, such as an explosion. *Matson* v. *Farm Buildings Ins. Co.*, 73 N. Y., 310; *reversing* 9 Hun, 415.

A clause in a policy, declaring the policy void if "camphene, burning fluid, or refined coal or earth oils" are "used" on the insured premises, will not be construed to intend the ordinary use of kerosene oil for illuminating purposes. *Bennett* v. *North British &c. Ins. Co.*, 8 Daly (N. Y.), 461.

[3] The applicant has a right to suppose that the insurer, in making inquiries as to certain facts, waives information as to all others. *Browning* v. *Home Ins. Co.*, 71 N. Y., 508.

Massachusetts.[1] It was an action upon a policy of insurance against fire. The plaintiffs in error, who were also plaintiffs below, resided at Malone, in the county of Franklin and state of New York, and the insurance company was at Boston, in Massachusetts.

The property insured was a cotton factory in Malone, owned originally by Jonathan Stearns, who applied for insurance on the 28th of April, 1834.

There were fifty questions asked by the insurance company, and answered by Stearns. The thirty-fourth question and answer were as follows:—

"34. Is the picker inside the building? If within, state where situated and how secured; if in a separate building, state if the passage-way communicating with the factory is secured by an iron door at each end, or how otherwise secured."

"34. The picker is inside of the building, but no lamps used in the picking-room; the doors are wood, and not covered."

The following was written in pencil at the close of the application by the agent at Pittsfield:—

"The assured warrants that the waste shall be removed as often as once in forty-eight hours to a safe distance from the mill, and that the lamps in the carding-rooms shall be inclosed in glass. (This condition is required.)"

A policy was issued to Stearns from July 1, 1834, for one year, for $3,000, on the factory-building and fixtures, including water-wheel, drums, shafts and gearing; $11,000 on the movable machinery, and $1,000 on the stock in the various stages of manufacturing.

On the 8th of July, 1834, Stearns assigned the policy to the Ogdensburg Bank, to which the company assented.

On the 17th of June, 1835, the cashier wrote to Mr. Hall, the agent of the insurance company, inclosing a check for $263, and requesting a continuance of the policy for one year; and in August, 1836, a similar letter, requesting a renewal or continuance of the policy.

In August, 1837, the cashier of the bank inclosed a draft for $263, and requested a new policy. One was accordingly issued, containing the same clauses as the preceding.

On the 13th of August, 1838, Stearns informed Mr. Hall, the agent, that the property insured had passed out of his hands into those of the bank.

On the 25th of August, 1838, the cashier wrote to Mr.

[1] Reported below, 2 Woodb. & M., 472.

Hall, requesting a continuance of the policy, but omitting the $1,000 on stock, as the mill was not then in operation.

In August, 1839 and 1840, similar letters were written. In *237] the policy issued in 1840, the following clause was inserted:—*"It is understood that the factory is not in operation, and that the assured have liberty to put the same in operation, agreeably to the representation heretofore made by Jonathan Stearns." Upon the receipt of this policy, the cashier returned the following answer:—

"*Ogdensburg Bank, August 27th*, 1840.

"PARKER L. HALL, ESQ., *Agent, &c.*

"Dear Sir,—Will you do me the favor to send me a copy of the original survey and application, as made by Jonathan Stearns, at the time Stearns effected an insurance on the cotton factory, &c., at Malone, as I observe that the first policy made out for us specifies 'agreeably to the representations heretofore made by Jonathan Stearns.' This institution does not know what those representations are, and as the factory is soon to be put in operation by Stearns, we having leased the same to him for one year, we wish you to send us a copy of the survey and application, in order to have Stearns act within those representations. We also wish you to send us your abstract of having the factory put in operation by Jonathan Stearns, under the policy that will take effect on the 30th instant, for one year from that time. If, on receipt of a copy of survey and application, it shall not be found sufficiently correct, you will be notified, and we shall expect you will consent to have the policy adapted to the corrected application, &c. In the policy of 1839 you say, 'contained in their application.' I am not aware that this institution has made any specific application, and suppose you intended the one given as to details by Stearns. Yours, &c.,

"JOHN D. JUDSON, *Cashier.*"

The reply of the agent was as follows:—

"*Pittsfield, 31st August*, 1840.

"JOHN D. JUDSON, ESQ., *Cashier.*

"Dear Sir,—Herewith I inclose to you a renewed policy, No. 622, on cotton factory, &c.; I have inserted the clause agreeably to your direction.

"Dear Sir,—I had deposited this letter in the post-office when I received your favor of the 27th instant. The policy is made out by inserting liberty of putting it in operation, as requested. The original survey I have not in my possession.

It is in the office at Boston. Perhaps Mr. Stearns may have kept a copy; if so, you will be able to obtain it of him; if not, I may procure for you a copy at Boston. You will, of course, see to it that the waste is removed according to the warranty, and that the lamps be inclosed in glass.

"Respectfully, P. L. HALL."

*It appeared that the cashier then wrote to Stearns [*238 for a copy of his representation, but Stearns replied that he had none. No further inquiries were made about it.

In August, 1841, the cashier wrote to the agent, saying,—"Please send me a new policy or a renewal receipt for the continuance of the same policy for one year from 30th instant. The factory is now and has been in operation the last year, under a lease to Colonel Jonathan Stearns. His lease will expire soon, and whether the bank will lease it again is more than I can say at present; but still we wish the same clause in the new policy that is in the present one, viz., that we have the right to put the mill in operation, &c., should we wish."

A policy was issued according to the above request, containing amongst other things the following:—"It is understood that the mill is under lease to Jonathan Stearns, and may again be leased to him or some other tenant, the assured being answerable for the warranty as above."

On the 18th of March, 1842, an indorsement was made upon the policy, that the assured had made a contract of sale, and given possession of the property to Eli Clark, William Green, and Hugh McGill, to which the approbation of the company was requested; which was given by Mr. Hall.

On the 19th of August, 1842, the cashier wrote again for continuance of policy No. 704 P, and requested a new policy to be made out in the names of Clark, Green, and McGill; in case of loss, the money to be paid to the bank. The policy was issued accordingly, containing the same clauses as before, with this remark added:—"This policy is issued upon the representation formerly made by Jonathan Stearns, the former owner, which representation is binding on the assured."

In August, 1843, 1844, and 1845, similar letters were written by the cashier, and similar policies issued, except that the last remark above quoted was not attached to them.

In March, 1846, the property was destroyed by fire, and soon afterwards notice thereof given to the company.

In October, 1846, the insured brought an action of assumpsit against the company, counting on the policy, and also containing the common money counts; under which a judgment

was obtained for a return of premiums, to the amount of $1,200.

In October, 1847, the case came up for trial, upon a plea of *non assumpsit* and issue. The plaintiffs offered in evidence the policy, the contract between the bank and Clark, Green, and McGill, and the payment of part of the purchase-money by the latter.

*239] The plaintiffs also proved the loss of the property by fire, notice *of the loss, that the waste was removed, and that the lamps in the carding-room were inclosed in glass, as required by the policy. Everything was proved or admitted that was necessary to make out a *prima facie* case for the plaintiffs.

The evidence showed, likewise, that the fire originated in the picking-room, which was situated in the centre of the building, and in which a glass lamp was frequently suspended from the ceiling, and into which room a glass lantern was carried that evening, and placed by the workman on the window-sill while the picker was in operation; around the top of this lantern he first saw the light and fire, as if the cotton-dust had become ignited through the air-holes, and the fire was communicated with such rapidity to the whole cotton he was unable to distinguish it. The evidence showed further, that when the picking-room had been occasionally used to work in during the night-time, this lantern, or one like it, had for three years been carried in, and that the globe lamp had been long used there suspended, with a reflector over the top, and was lighted when they worked at night in the picking-room, as well as the lantern. This appears to have been the practice soon after 1834 or 1835, but no evidence was offered that it had been before. When the plaintiffs bought the property in 1842, they found the lamp hung and ready for use, and they continued to use it as it had been used before.

The defendants then offered in evidence the application of Stearns for insurance, his written answers to the fifty questions, and the policies and letters above mentioned.

The defendants then called Parker L. Hall, who testified that, prior to the first policy to Stearns, he was agent of the defendants in Pittsfield, and that his authority did not extend to the taking of new risks on this species of property.

It was admitted that such a use of lamps in the picker-room as appeared in this case, enhanced the danger of fire, and was material to the risk.

To the admission of all this evidence the counsel for the plaintiffs then and there objected, on the ground that the policy contained no representations made by Jonathan Stearns,

and had no reference whatever to any such representations, and that to admit extrinsic evidence of the representations of the said Stearns, and other extrinsic evidence to connect the plaintiffs with those representations, and thus affect their rights by such representations, was not only to vary, enlarge, or modify the contract, as contained in the policy, but was in fact to set up and show, by extrinsic evidence, a distinct and different contract from that contained in the policy, and of which the policy *is the written evidence on [*240 which the parties relied; and, as the printed clause in the policy referred only to representations of the assured, representations in form by the assured were the only representations which could legally be shown, and evidence that the parties did not mean the representations in form by the assured, or expressed in the policy, but meant representations of Stearns, was not admissible, because that would clearly be to enlarge or change the contract in the policy, or rather to set up a distinct and different contract.

But the court admitted all the evidence as proper and legal, and to this ruling and decision of the court the counsel for the plaintiffs excepted.

The plaintiffs also proved that it was customary for these defendants, and other insurance companies in Boston, to issue policies on property, with which the underwriters were acquainted, in the printed form, like that in this case, with the clause referring to the "representation of the assured, contained in their application, to which reference is to be had," where no written application has in fact been made by the assured, and where there is no written representation to which reference can be had. The counsel for the defendants objected to the admissibility of the evidence by which these facts were proved.

The counsel for the plaintiffs requested the honorable justice who presided at the trial to instruct the jury,—

1. That whether the printed clause in the policy—"that this policy being made and accepted upon the representation of the said assured, contained in their application therefor (to which reference is to be had)"—was to be taken as referring to the representation of Stearns, in 1834, was matter of law to be determined by the court, the construction and application of written contracts and instruments being wholly within the province of the court.

2. That, in the opinion of the court, the said clause was not to be taken as referring to the said representation of the said Stearns; that these representations are not to be taken as a part of the said policy, or as in any way binding on the

plaintiffs, whose right to recover in this case could not be in any way affected by said representation.

8. That the evidence introduced by the defendants was not sufficient in law to bar the plaintiffs' right to recover.

But the honorable justice declined giving these instructions to the jury, and instructed them that they would be warranted in finding that the plaintiffs had adopted the representations made by Jonathan Stearns as a part of this policy; that, if those representations were adopted by the plaintiffs, *241] they formed *a part of the present policy in the same manner as if incorporated into it, and the use of lamps in the picker-room, in the manner testified to, in violation of these representations, rendered the policy void, and the plaintiffs would not be entitled to recover, except for a return of the premiums paid for the last four years. And the jury were further instructed, that if they found the policy declared on did not refer to the said representations of Stearns, and that no representation was in fact made or adopted by the plaintiffs respecting the use of lamps in the picker-room, they would then take the law to be, that, as it was agreed by the parties that the use of lamps in the picker-room in the manner found was material to the risk, it was the duty of the plaintiffs to disclose the fact of such use to the defendants, or their agent, when the policy was applied for, provided such use then existed, and was known to the plaintiffs and unknown to the defendants, and was then intended by the plaintiffs to be, and in fact was, continued after the policy was issued, and occasioned the loss in question; and that each failure of the plaintiffs, even without any fraudulent intent on their part, to make this fact known to the defendants, would avoid the policy. Thereupon the jury returned a verdict for the plaintiffs, for a return of four years' premium.

To these instructions, and to the said refusal to instruct, as well as to the admission of the said evidence, the plaintiffs then and there excepted; and prayed that their exceptions might be allowed and sealed by the said justice, and the same were allowed and sealed accordingly.

In witness whereof I have hereunto set my hand and affixed [SEAL.] my seal, this 10th day of November, A. D. 1847.

LEVI WOODBURY,
Associate Justice Supreme Court U. S.

Upon these exceptions the case came up to this court.

It was submitted on printed arguments by *Mr. Gillet*, for the plaintiffs in error, and *Mr. Curtis* and *Mr. D. A. Hall*, for the defendants in error.

It is only possible to give a brief sketch of the points taken respectively by the counsel.

Mr. Gillet, for plaintiffs in error.

The first question presented by the record for the consideration of the court is, whether the evidence offered by the defendants was legally admissible.

The policy of insurance which is the foundation of this action is in the ordinary form, most of it being in print, and is *plain, unambiguous, and complete in itself. It is susceptible of but one construction, and is as definite as any contract can be made. The defendants, for the purpose of defeating our claim upon it, were allowed to introduce twenty-eight distinct pieces of evidence, with the view of tacking to the contract certain representations made by a former owner of the property, more than eleven years previous to its date. What the object of this evidence was appears from the charge of the learned judge who tried the cause. He instructed the jury, "that they would be warranted in finding that the plaintiffs had adopted the representations made by Jonathan Stearns as a part of this policy, that if those representations were adopted by the plaintiffs, they formed a part of the present policy, in the same manner as if incorporated into it." Thus the jury were left to decide, as a question of fact, whether the representations of Stearns were defunct and obsolete, or a living member of the defendants' contract of insurance. And thus a perfect written contract was nullified and destroyed by a mass of parol evidence of facts, which occurred mostly between other parties, long prior to its execution. [*242

The general principles of law excluding parol evidence when offered to vary, add to, or modify written contracts, are laid down in 1 Greenl. on Ev., part 2, ch. 15, where many cases are also collected. The case of *Miller* v. *Travers*, 8 Bing., 244, is strongly in point. This rule has always been applied in cases on policies of insurance, and often when it operated with great hardship. It was so applied in *Finney* v. *Bedford Commercial Ins. Co.*, 8 Metc. (Mass.), 348; *Bryant* v. *Ocean Ins. Co.*, 22 Pick. (Mass.), 200; *Alston* v. *Mechanics' M. Ins. Co.*, 4 Hill (N. Y.), 329; *New York Ins. Co.*, v. *Thomas*, 8 Johns. (N. Y.) Cas., 1; *Higginson* v. *Dall*, 13 Mass., 96; *Dow* v. *Whetten et al.*, 8 Wend. (N. Y.), 160; *Cheriot* v. *Barker*, 2 Johns. (N. Y.), 346; *Jennings* v. *Chenango Ins. Co.*, 2 Den. (N. Y.), 75; and rigidly and harshly was it adhered to in *Ewer* v. *Washington Ins. Co.*, 16 Pick. (Mass.), 502. Mr. Duer, in the first volume of his Treatise on Insurance, p. 71.

says, the policy from the time of its execution constitutes the sole evidence of the agreement of the parties, and that no previous letters or communications between them, not even the written application or agreement, can be used to vary or control its interpretation. Now, according to this rule, if the parties had agreed in writing to be bound by Stearns's representations, and the fact had been omitted in the policy, it could not be proved by reference to the prior written agreement.

II. The next question to be discussed is the effect of the evidence, supposing it admissible. (The counsel then commented upon the different terms in the policies.)

*243] *Each policy was a separate and distinct contract. Neither could be modified by another. If the defendants intended to make the last policy like that of 1842, by binding the plaintiffs to the representations of Stearns, and omitted it by mistake, such mistake cannot be corrected on the law side of the court. Nor would this court, sitting in equity, modify the policy by inserting Stearns's representations in it. If the omission of all reference to Stearns in this policy was at the request of the plaintiffs, such omission forms a part of the contract; if it was the voluntary act of the defendants, they are bound by it; and if it was done by their mistake, the plaintiffs are not responsible for the results of their slovenly mode of doing business. *Andrews* v. *Essex F. and M. Ins. Co.*, 3 Mason, 6; *Hogan* v. *Delaware Ins. Co.*, 1 Wash. C. C., 419; 1 Duer on Ins., 132, note xi.; *Graves* v. *Boston Marine Ins. Co.*, 2 Cranch, 419.

III. The representations of Stearns form no part of this policy, because they are not incorporated into it, nor are they in any way referred to in the policy as forming a part of it. *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. (N. Y.), 72; *Snyder* v. *Farmers' Ins. and Loan Co*, 13 Id., 92; *Farmers' Ins. and Loan Co.* v. *Snyder*, 16 Id., 481; 3 Kent. Com., 373; *Alston* v. *Mechanics' Mutual Ins. Co.*, 4 Hill (N. Y.), 329. In the case of *Houghton* v. *Manufacturers' Mutual Fire Ins. Co.*, 8 Metc. (Mass.), 114, it was held that the representations of the assured were legally adopted and embodied into the policy as a part of the contract. But in that case the representations were annexed to the policy, and the court say, that "the policy, by the manner in which it refers to the application and representations, does legally adopt and embody them as a part of the contract." But in this case there is no reference whatever in the policy to Stearns's representations.

IV. There being no written agreement by the plaintiffs to adopt Stearns's representations, it was only a verbal promise

to make them good. But this is contrary to 4 Hill (N. Y.), 329, and 22 Pick. (Mass.), 200.

V. There was error in the last instruction of the court to the jury.

The counsel for the defendants in error argued in support of the following points:—

1st. That the insured had made certain representations, which were to be deemed part of the contract, and which being false, and the loss occurring by means of their falsehood, no recovery could be had.

2d. That the insured failed to make known to the [*244 underwriters, *when the policy was obtained, a fact material to the risk, known to the assured and unknown to the underwriters, and which was the cause of the loss, and therefore the policy was void.

I. The first proposition was subdivided into the following three branches:—

1. That the plaintiffs, by accepting the policy of August, 1842, made Stearns's representation their own, so that it might be, and in fact was, afterwards correctly described in the renewal policy declared on as the representation of the assured.

2. That by applying for a continuance of the policy, which was based solely on these representations, they did, in legal effect, adopt these representations into, and make them a part of, their application; so that it might be, and in fact was, correctly said in such renewal policy, that the representation was contained in the application.

3. That it clearly appearing, by the policy itself, that the original policy to the plaintiffs was issued upon the representation of Stearns, which thereafter was to be binding on the plaintiffs, and was referred to therein as the representation of the assured, and that the subsequent policies, including the one declared on, were merely continuations of that contract; and it further appearing that no representation was ever made except the one made by Stearns, and that therefore this important clause in the policy could refer to no other, and is senseless and void unless it refers to that; the jury were rightly instructed that they would be warranted in finding that the plaintiffs had adopted the representation of Stearns as a part of this policy. It may be, that, upon the actual posture of the evidence, it was not a question for the jury, because there was no fact in controversy; but this is wholly immaterial if the jury have found, under the instructions of the court, a verdict, right in point of law: the only difference being that

they were instructed they might so find, instead of being told they must so find.

II. Upon the second ground of defence. This seems too clear to require much argument. The case in this aspect is, that the assured make no disclosure respecting the fact that lamps were used in the picker-room; that such use was a fact material to the risk; that such use then existed, and was known to the plaintiffs and unknown to the defendants, and was then intended by the plaintiffs to be, and in fact was, continued after the policy was issued, and that it occasioned the loss. A policy made under such circumstances is void. It is not necessary to show that a contract of sale, or any *245] other contract, would be void for a similar cause. It is enough that a contract *of insurance is thus avoided. 1 Wash. (Va.), 161; 1 Phil. on Ins., 214; 2 Duer on Ins., 380, 506; 6 Cranch, 279, 338; 1 Pet., 185; 2 Id., 25, 49; 10 Id., 507, 512; 16 Id., 496.

Mr. Justice WOODBURY delivered the opinion of the court.

The original action in this case was assumpsit by the plaintiffs in error on a policy of insurance, made August 13, 1845.

From the detailed statement of the facts, it will be seen that the loss occurred on the 13th of March, 1846, and was to be paid to the Ogdensburg Bank, which held the title to the property insured, but was under a contract in a certain event to convey it to the plaintiffs, they having already paid for it in part.

The original insurance was made in 1834, by Jonathan Stearns, who had mortgaged to the bank the factory insured, and who continued most of the time till the loss to conduct its operations under insurances renewed yearly, often in different names,—stipulating that any loss should be paid to the bank.

In April, 1834, when application was first made for insurance, the defendants, doing business in Boston (Mass.), put numerous written interrogatories to Stearns, who lived in Malone (New York), where the factory was situated, and to one of them he replied, that no lamps were "used in the picking-room." These interrogatories, and the answers to them, were not annexed to the policy, but were put on file in the office; and the policy purported to have been "made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had," &c., &c.

No new representations appear to have been made at the

different renewals, but only a general reference to representations, like that just named; and in three or four instances, when the policy was in a new name, a specific statement was inserted that the insurance was entered into "agreeably to the representations heretofore made by Jonathan Stearns."

Referring to the record and preliminary statement of this case for other details, the plaintiff objected first to the competency of parol evidence, which was offered to prove that the representations signed by Stearns, and on file with his application, were those made by him, and to the instruction of the court, that, if they were adopted by the plaintiffs, the present policy as well as the original one must be considered as founded on them and void, if they were not true.

It will be proper, then, to consider first whether this parol evidence was competent for the purpose for which it was offered.

*Without meaning to impugn the great elementary [*246 principle, that written instruments are not to be varied or contradicted by parol, it suffices to say here that this testimony was not admitted to vary or contradict any portion of what had been written. See *Phillips* v. *Preston*, 5 How., 291.

It merely went to identify what the writing in the policy referred to, as a part or parcel of the contract, like a reference in one deed or contract to another deed or contract. 18 Wend. (N. Y.), 92; *Jennings* v. *Chenango Ins Co.*, 2 Den. (N. Y.), 82; Phillips on Ins., 47; 16 Pick. (Mass.), 502; 1 T. R., 343; 2 Brod. & B., 553; 4 Russ., 540; 20 Pick. (Mass.), 121; 1 Paige (N. Y.), 291; 8 Metc. (Mass.), 114, 350; 4 How., 353; 3 Barn. & Ald., 299; Wigram on Ext. Ev., 54, 55; 1 H. Bl., 254; 2 Id., 577; 6 T. R., 710; 1 Duer on Ins., 74.

It added to what was written nothing, it subtracted nothing, it changed nothing, and we think its admission was legal.

In the next place, the instruction that the plaintiffs were bound by those representations, if adopting them subsequently at the time of making their insurance, accorded with both the law and equity of the transaction. If they adopted them and induced the defendants to act on them, it would operate fraudulently to let them be disavowed after a loss. So if the plaintiffs ratified them, in their subsequent application, if no other representations were made or relied on except these, if their attention was called to these; if the bank was a party in interest through all these insurances, without repudiating these representations, and if these were the only set of representations used in all of them, it surely must comport with justice, as well as law, to have them govern.

whether this court would consider the original representations by Stearns as adopted, and thus binding on those subsequently insured. Independent of those, none appear to have been made or asked.

Representations, however, in insurances, it is well known, almost invariably exist, either written or parol. *Columbian Ins. Co.* v. *Lawrence*, 2 Pet., 49; S. C., 10 Id., 515. But they are not usually named or incorporated in the policy, except on the continent of Europe. 3 Kent, 237; 9 Barn. & C., 698.

It is fair to presume, that they took place in all the reported cases on insurance, though often not named, unless the contrary is expressly stated, as they are in general "the principal inducements to contract, and furnish the best grounds upon which the premium can be calculated." (1 Marsh. on Ins., 450.)

*249] But the relation of the parties seems entirely changed, if the *insurer asks no information and the insured makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think that the governing test on it must be this,—it must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him.

This rule must not be misapprehended and supposed to rest on a principle different and somewhat ordinary, that insurers are always to be expected to possess some general knowledge of such matters as they deal with, independent of inquiries to the assured. 8 Pet., 582.

Nor on the position well settled, that the insurer must be presumed to know what is material in the course of any particular trade,—its usages at home and abroad, and those transactions which are public, and equally open to the knowledge of both parties. *Hazard's Ad.* v. *New England Mar. Ins. Co.*, 8 Pet., 557; 2 Duer on Ins., 379, 478; 3 Kent. Com., 285, 286; *Green* v. *Merchants' Ins. Co.*, 10 Pick. (Mass.), 402; 4 Mason, 439; *Buck et al.* v. *Chesapeake Ins. Co.*, 1 Pet., 160. Nor on any special usage proved, as in *Long* v. *Duff*, 2 Bos. & P., 210, that it was, in a case like this, the duty of "the underwriter to obtain this information for himself."

But when representations are not asked or given, and with only this general knowledge the insurer chooses to assume the risk, he must in point of law be deemed to do it at his peril. It has been justly remarked, in a case somewhat like this in

principle,—"With this knowledge, and without asking a question, the defendant underwrote; and by so doing he took the knowledge of the state of the place upon himself," &c. 1 Marsh. on Ins., 481, 482; *Carter* v. *Boehm*, 3 Burr., 1905.

In cases of fire insurance, also, the underwriters may be considered as more likely to do this than in marine insurance; because the subject insured is usually situated on land and nearer, so as to be examined easier by them or their agents; and the circumstances connected with it are more uniform and better known to all. 1 Har. & G. (Md.), 295; *Burrit* v. *Saratoga M. F. Ins. Co.*, 5 Hill (N. Y.), 192.

It is true, that, from what is reasonable and just, some exceptions must exist to this general rule, though none of them are believed to cover the present case. Thus the insurer must be supposed, if no special information has been asked or obtained, to take the risk, on the hypothesis that nothing unusual exists *enhancing the risk; and hence, as [*250 in this case, if lamps are used in the picking-room, which do enhance it, he must show that their use in the manner practised was unusual or not customary, and then, though no representations had been asked or made, he would make out a case, where it was the duty of the insured to inform him of the fact, and where *suppressio veri* would be as improper and injurious as *suggestio falsi*. *Livingston* v. *Mar. Ins. Co.*, 6 Cranch., 281.

So if any extrinsic peril existed, outside and near a building insured, and which increased the risk, the insured should communicate that, though not requested. *Bufe* v. *Turner*, 6 Taunt., 338; *Walden* v. *Lou. Ins. Co.*, 12 La., 184. But as to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them; and, if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak. The conclusions on the whole case then are, that the defendants are entitled to be discharged on the first ground upon the merits; because the plaintiffs were interrogated in writing on this very fact and risk, or others were, whose answers they adopted; and the truth was not disclosed in their representations in reply, when it is conceded to have been material to the risk; and therefore, by the express stipulations of this policy, as well as by the general principles of the law of insurance, the plaintiffs should not recover. But our judgment cannot be rendered on this conclusion, standing alone, because the second point is connected with it in the form before explained. Again, the defendants

would be entitled to be discharged under the second point on the ground, which accords with the truth here, that representations were really made on this subject; but not, if none whatever were made, according to what is hypothetically suggested in the record. The judgment below must, therefore, be reversed, for the purpose of correcting what is defective in the manner of stating how the verdict was taken and how the last question stood by itself on the facts proved; and the case must be remanded to the court below, with instructions to take all proper steps to carry into effect the views presented in this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this *court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, for the purposes of correcting what is defective in the manner of stating how the verdict was taken, and how the last question stood by itself on the facts proved, and that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings to be had therein in conformity to the opinion of this court.

*251]

NATHANIEL LORD, PLAINTIFF IN ERROR, *v.* JOHN W. VEAZIE, DEFENDANT.

Where it appears to this court, from affidavits and other evidence filed by persons not parties to a suit, that there is no real dispute between the plaintiff and defendant in the suit, but, on the contrary, that their interest is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the Circuit Court entered *pro forma* is a nullity and void, and no writ of error will lie upon it. It must, therefore, be dismissed.[1]

Such an action is not an "amicable action" as those words are understood in courts of justice.

It seems that to obtain the opinion of the court, affecting the rights of third persons not parties to such suit, is punishable as a contempt of court.

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[1] APPLIED. *Cleveland* v. *Chamberlain*, 1 Black, 419, 425; *Wood-paper Co.* v. *Heft*, 8 Wall., 336. DISTINGUISHED. *Farmers' Loan & Trust Co.* v *Green Bay &c. R. R. Co.*, 10 Biss., 215; s. c., 6 Fed. Rep., 112. FOLLOWED. *Amer. Middlings Purifier Co.* v. *Vail*, 4 Bann. & A., 3, 4; *Gaines* v. *Hennen*, 24 How., 628.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Maine.

A motion was made by Mr. Moor, upon his own account and also as counsel for the City Bank, at Boston, to dismiss the appeal, upon the ground that it was a fictitious case, got up between said parties for the purpose of settling legal questions upon which he, the said Moor and the City Bank, had a large amount of property depending. The motion made by Mr. Moor upon his individual account was to dismiss the appeal; that made by him as counsel for the City Bank was in the alternative, either to dismiss the suit, or order the same back to the Circuit Court for trial, and allow the said City Bank to be heard in the trial of the same.

It appeared upon the documents and affidavits filed, that, in 1842, the Bangor and Piscataquis Canal and Railroad Company, in the state of Maine, which had been chartered by the state, executed a deed to the City Bank, at Boston, by virtue of which that bank claimed to hold the entire property of the company.

In 1846, the legislature of Maine granted to William Moor and Daniel Moor, Jun., their associates and assigns, the sole right of navigating the Penobscot River.

In July, 1847, an act was passed additional to the charter of the first-named company, by virtue of which a reorganization took place. The City Bank claimed to be the sole proprietors *or beneficiaries under this new charter, [*252 and John W. Veazie, who held a large number of shares in the original company, claimed that the management and control were granted to the stockholders.

In August, 1848, John W. Veazie and Nathaniel Lord executed a written instrument, which purported to be a conveyance by Veazie to Lord of 250 shares of the stock of the railroad company, for the consideration of $6,000. This deed contained the following covenant:—

"And I do hereby covenant and agree to and with the said Lord, that I will warrant and defend the said shares, and all property and privileges of said corporation incident thereto, to the said Lord, his executors, administrators, and assigns, and that the said shares, property, and privileges are free and clear of all encumbrances; and I further covenant with said Lord, that the stockholders of said company have the right to use the waters of the Penobscot River within the limits mentioned in their charter for the purposes of navigation and transportation by steam or otherwise."

In September, 1848, this action on the above covenant was docketed by consent, and a statement of facts agreed upon by

the respective counsel, under which the opinion of the court was to be taken, viz., that if the claim of the City Bank was valid, then the plaintiff was entitled to recover; or if the canal and railroad company, or the stockholders thereof, had not a right to navigate the river, then the plaintiff was also entitled to recover. This last prayer involved Moor's right.

In October, 1848, the court, held by Mr. Justice Ware, gave judgment for the defendant *pro forma*, at the request of the parties, in order that the judgment and question might be brought before this court, and the case was brought up by writ of error, as before mentioned.

On the 31st of January, 1849, the record was filed in this court, and on the 2d of February, printed arguments of counsel were filed, and the case submitted to the court on the 5th. It was not taken up by the court, but continued to the next term.

On the 28th of December, 1849, Mr. Wyman B. S. Moor filed, with the motion to dismiss, as above mentioned, an affidavit, stating the pendency of a suit by him against Veazie in the courts of Maine, which involved the same right of navigating the river which was one of the points of the present case. He further stated his belief, that this case was a feigned issue, got up collusively between the said Lord and *253] Veazie, for the purpose of prejudicing his (Moor's) rights, and *obtaining the judgment of this court upon principles of law affecting a large amount of property, in which he and others were interested.

When the motion came on for argument, a number of affidavits were filed in support of and against the motion. It is unnecessary to state their contents, as they were not particularly commented on by the court. They proved that none of the persons whose interest was adverse to that of the plaintiff and defendant had any knowledge of these proceedings, until after the case was removed to this court, and submitted for decision on printed arguments, although one or more of those most deeply interested resided in the town in which Lord, one of the parties, lived.

The motion was argued by *Mr. Moor*, in support of, and *Mr. Bradbury* and *Mr. Hamlin* against it.

In support of the motion to dismiss, these points were taken by *Mr. Moor*:—

1. That a fictitious suit, or a feigned issue, or a suit instituted by persons to try the rights of third persons, not parties to the record, is a contempt of court, and will be dismissed on

motion. *Hoskins* v. *Lord Berkeley*, 4 T. R., 402; 3 Bl. Com., 452; R. J. Elsam, an attorney, 3 Barn. & C., 597; 2 Inst., 215; *Brewster* v. *Kitchin*, Comb., 425; *Coxe* v. *Phillips*, Cas. Temp. Hardw., 237; *Fletcher* v. *Peck*, 6 Cranch, 147, 148.

2. That any person as *amicus curiæ* may make the motion. *Rex* v. *Veaux*, Comb., 13; *Dove* v. *Martin*, Id., 170; *Brown v. Walker*, 2 Show., 406; *Coxe* v. *Phillips*, before cited.

3. A suit may be shown to be fictitious, either by inspection of the record or by evidence *aliunde*, or by both. The case of R. J. Elsam, before cited; *Hoskins* v. *Lord Berkeley*, before cited; *Fletcher* v. *Peck*, before cited; *Coxe* v. *Phillips*, before cited.

4. That this is a fictitious suit, or a suit amicably instituted and conducted, to affect the rights of other parties, will appear from the record.

5. That it is an amicable or fictitious suit appears from the facts, that the suit in equity in the Supreme Judicial Court of Maine, *Moore* v. *Veazie*, involves the same question as to the construction and constitutionality of the act set forth in printed case, and marked G, as are involved in the case at bar, and that the plaintiff in error is the son-in-law, and the defendant in error is the son, of said Samuel Veazie.

That said suit was in contemplation before the institution of this suit.

*That the defendant in error has heretofore set up the same claim to the property of said railroad company against the City Bank as is involved in this suit. [*254

That the existence of this suit was kept from the knowledge of the parties really interested, till the writ of error was entered here.

This court sits for the correction of errors of inferior courts, and not to adjudicate upon the agreement of parties.

There has been no such judgment in this suit that this court will revise by writ of error. Judiciary Act of 1789, § 22 (1 Stat. at L., 84); Act of April 29, 1802, ch. 31, § 6 (2 Id., 159); *Lanusse* v. *Barker*, 3 Wheat., 137, 147; *McDonald* v. *Smalley et al.*, 1 Pet., 621; *Shankland* v. *The Corporation of Washington*, 5 Id., 390; *Stimpson* v. *Westchester Railroad Co.*, 3 How., 553; *Dewolf* v. *Usher*, 3 Pet., 269; *Zeller's Lessee* v. *Eckert*, 4 How., 298.

Mr. Chief Justice TANEY delivered the opinion of the court.

The court is satisfied, upon examining the record in this case, and the affidavits filed in the motion to dismiss, that the contract set out in the pleadings was made for the purpose of

instituting this suit, and that there is no real dispute between the plaintiff and defendant. On the contrary, it is evident that their interest in the question brought here for decision is one and the same, and not adverse; and that in these proceedings the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit, who had no knowledge of it while it was pending in the Circuit Court, and no opportunity of being heard there in defence of their rights. And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed on between themselves, without the knowledge of the parties with whom they were in truth in dispute, and upon a judgment *pro forma* entered by their mutual consent, without any actual judicial decision by the court. It is a question, too, in which it appears that property to a very large amount is involved, the right to which depends on its decision.

It is proper to say that the counsel who argued here the motion to dismiss, in behalf of the parties to the suit, stand entirely acquitted of any participation in the purposes for which these proceedings were instituted; and indeed could have had none, as they were not counsel in the Circuit Court, and had no concern with the case until after it came before this court. And *we are bound to presume that the *255] counsel who conducted the case in the court below were equally uninformed of the design and object of these parties; and that they would not knowingly have represented to the court that a feigned controversy was a real one.

It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves,—and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.

The suit is spoken of, in the affidavits filed in support of it, as an amicable action, and the proceeding defended on that ground. But an amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of

right. And in a case of that kind it sometimes happens, that, for the purpose of obtaining a decision of the controversy, without incurring needless expense and trouble, they agree to conduct the suit in an amicable manner, that is to say, that they will not embarrass each other with unnecessary forms or technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay. But there must be an actual controversy, and adverse interests. The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties. The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.[1]

A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible, and the learned district judge, who was then holding the Circuit Court, undoubtedly *suffered the judgment *pro forma* to be [*256 entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it. This writ is, therefore, dismissed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maine, and was argued by counsel, and it appearing to the court here, from the affidavit and other evidence filed in the case by Mr. Moor, in behalf of third persons not parties to this suit, that there is no real dispute between the plaintiff and defendant in this suit, but, on the contrary, that their interest is one and the same, and is adverse to the inter-

[1] APPLIED. *Wood-paper Co.* v. *Heft*, 3 Wall., 336.

costs of the persons aforesaid, it is the opinion of this court, that the judgment of the Circuit Court entered *pro forma* in this case is a nullity and void, and that no writ of error will lie upon it. On consideration whereof, it is now here ordered and adjudged by this court, that the writ of error be, and the same is hereby, dismissed, each party paying his own costs, and that this cause be, and the same is hereby, remanded to the said court, to be dealt with as law and justice may require.

ELIJAH PEALE, TRUSTEE AND ASSIGNEE OF THE PRESIDENT, DIRECTORS, AND COMPANY OF THE AGRICULTURAL BANK OF MISSISSIPPI, PLAINTIFF IN ERROR, *v.* MARTHA PHIPPS AND MARY RICE, WHO IS AUTHORIZED AND ASSISTED IN THE SUIT BY HER HUSBAND, CHARLES RICE.

An error in a citation, calling Mary Rice the wife of Charles Bowers, whereas she was the wife of Charles Rice, is not fatal in a case coming from Louisiana. The practice there is for the husband to assent when the wife brings a suit, so that his name is merely a matter of form.

Nor is it a fatal error when the citation was issued at the instance of E. Peale as plaintiff in error, instead of Elijah Peale, Trustee of the Agricultural Bank of Mississppi.

The acceptance of the service of the citation by the attorney for the parties shows that the error led to no misapprehension.

THIS case was brought up, by writ of error, from Louisiana, and a motion was made by *Mr. Henderson* to dismiss it, upon the grounds stated in the opinion of the court.

*257] *Mr. Justice McLEAN delivered the opinion of the court.

A motion is made to dismiss this writ of error on three grounds:—

1. Because there is no citation to the defendants in error, as the law requires.

2. Because the citation is addressed to Martha Phipps and Mary Rice, "wife of George Bowers, and by him assisted," who are not the persons or parties defendants in the record.

3. Because said citation is stated to have been issued at the instance of E. Peale, as plaintiff in error,—instead of Elijah Peale, Trustee of the Agricultural Bank of Mississippi, &c.

The suit was brought by Martha Phipps and Mary Rice;

and in the petition they are called Martha Phipps and Mary Bowers, wife of Charles Rice, "who is authorized and assisted in this suit by her said husband, Charles." The defendant is named "Elijah Peale, in his capacity of Trustee and Assignee of the President, Directors, and Company of the Agricultural Bank of Mississippi." The decree is in favor of Martha Phipps and Mary Rice.

The citation appears to have been issued by E. Peale, and was directed to Martha Phipps and Mary Rice, "wife of George Bowers, and by him assisted." And the service of the citation was accepted by S. S. Prentiss, plaintiff's attorney, at New Orleans, the 22d of October, 1849.

The names of the defendants in error are correctly stated in the citation, except that Mary Rice is represented as the wife of George Bowers, instead of the wife of Charles Rice. Under the procedure in Louisiana, the husband is named in the petition as assenting to the suit brought in the name of his wife. He is not a party to the suit, nor is he responsible for costs. The use of the name of the husband is merely formal, and the misnomer alleged could not have misled the defendants in error. Nor could they have been misled by the omission in the notice of the capacity of trustee, in which the defendant below was sued, and in which he necessarily prosecutes the writ of error. The acceptance of the service of the notice by the counsel of the defendants in error, without exception, shows that there could have been no misapprehension in regard to it. The motion to dismiss the case is overruled.

Order.

On consideration of the motion to dismiss this writ of error, submitted to the court by General Henderson, on a prior day *of the present term of this court, to wit, on [*258 Friday, the 28th ultimo, it is now here ordered by this court, that said motion be, and the same is hereby, overruled.

JACOB P. WILSON, COMPLAINANT, *v.* DANIEL BARNUM.

The following question, sent up to this court upon a certificate of division in opinion between the judges of the Circuit Court,—viz., "Whether, according to the true construction of the Woodworth patent, as amended, the machines made or used by the defendant at the time of filing the bill, or either of them simply, do or do not infringe the said amended letters patent?"—is a question of fact, over which this court has no jurisdiction.

The jurisdiction given to it by statute in certified cases only extends to points of law.[1]

THIS case came up from the Circuit Court of the United States for the Eastern District of Pennsylvania upon a certificate of division in opinion between the judges thereof.

It is not necessary to do more than insert the statement of facts and point of division, as they are found in the record.

Statement of Facts and Point of Division of Judges.

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania.*

At a Circuit Court of the United States, begun and held at the city of Philadelphia, for the Eastern District of Pennsylvania, on the 13th day of November, in the year of our Lord 1849.

Present, the Honorable Robert C. Grier, and the Honorable John K. Kane.

JACOB P. WILSON *v.* DANIEL BARNUM.

Statement of Facts.

This was a suit in equity. The bill was filed April 5th, 1849, by the plaintiff, as assignee of letters patent issued to William Woodworth. After due notice, a motion was made for a special injunction, which was fully heard before his Honor, John K. Kane, at a regular Circuit Court, on the 21st, 22d, 23d, 24th, and 25th days of May, A. D. 1849, his Honor, Judge Grier, being absent. The defendant resisted the motion, and filed affidavits on his part, when, after a full hearing of the parties and arguments of counsel, on the 1st day of June, 1849, a special injunction was granted, a copy of which is annexed to this statement. Afterwards, on the 4th day of June, 1849, the defendant filed an answer, setting up
*259] the fact of his having a patent for his machine, and denying all similarity between it and that of the plaintiff; which same defence had been previously set up by the said affidavits, on the hearing of the motion for the injunction. Afterwards, on the 29th day of June, 1849, a motion was made by the defendant to dissolve the injunction, which motion was duly argued on the bill and affidavits on the part of the plaintiff, and on the answer and affidavits on the part of

[1] FOLLOWED. *Dennistoun et al.* v. *Stewart*, 18 How., 568. CITED. *Silliman* v. *Hudson River Bridge Co.*, 1 Black, 584; *Weeth* v. *New England Mortgage Co.*, 16 Otto, 606.

the defendant; and on the 1st day of August, 1849, an order was made in the cause directing an issue to be tried by a jury, for the purpose of ascertaining whether the machines of the defendant were or were not infringements of the machine of the plaintiff, and ordering the injunction to stand, on the plaintiff giving security to the defendant in the sum of ten thousand dollars, which was done.

The issue came on to be tried by a jury on the 17th day of October, 1849, and after a protracted trial, the jury was discharged, not being able to agree.

At this present term of the court, both of the judges being present, a motion was made by the defendant to dissolve the injunction, and arguments of counsel were heard thereon. Thereupon, without any decision being had on said motion, and upon an agreement of the parties, with the consent and by the direction of the court, this cause was brought to a final hearing on the pleadings and the proofs which had been taken herein, as well as on the proofs and evidence which were put in on the trial of the issue before the jury, and which last-named proofs and evidence were, for the purpose of said final hearing, considered as proofs in this cause.

The pleadings were a bill, an answer, and a replication, copies of which are hereunto annexed, and a copy of all the proofs and evidence used on said final hearing is also hereunto annexed.

On said final hearing, it appeared and was determined by the court as matter of fact,—

1. That letters patent of the United States were issued to William Woodworth, on the 27th day of December, 1828, of the tenor and effect mentioned in the bill.

2. That William Woodworth died intestate, on the 9th day of February, 1839, in the city of New York, and that William W. Woodworth, his son, and one of his heirs at law, was thereupon duly appointed his administrator by the surrogate of the city and county of New York.

3. That on the 16th day of November, 1842, an extension of the said letters patent for seven years from the 27th day of December, 1842, was duly granted by the United States, under the eighteenth section of the Patent Act of July 4, 1836, to *the said William W. Woodworth, as administrator as aforesaid. [*260

4. That by an act of Congress of the United States, passed February 26th, 1845, the said letters patent were further extended to the said William W. Woodworth, as administrator as aforesaid, for seven years from the 29th day of December, 1849.

5. That on the 8th day of July, 1845, the said letters patent were surrendered for a defective specification, and renewed letters patent were thereupon issued on the same day, on an amended specification, to the said William W. Woodworth, as administrator as aforesaid; which renewed letters patent were of the tenor and effect set forth in the bill. An authenticated copy of the said renewed letters patent of July 8, 1845, and of the specification and drawings thereto, and an authenticated copy of the said original letters patent of December 27th, 1828, and of the specification and drawings thereto, were produced on the hearing, and may be produced on argument, before the Supreme Court of the United States.

6. That the exclusive right of the said renewed letters patent of July 8, 1845, for the district of Southwark, in the county of Philadelphia, and Eastern District of Pennsylvania, was vested in the plaintiff.

7. That the defendant had erected, within the said district of Southwark, and used and operated therein, since the said exclusive right became vested in the plaintiff, and before the filing of the bill, a machine for tonguing and grooving boards and plank, and also a machine for planing boards and plank. The machine for tonguing and grooving boards and plank was constructed as stated in the evidence. (A model thereof was produced on the hearing by the plaintiff, and the machine itself was produced on the hearing by the defendant. The same are certified by the clerk of the court, and may be used on argument before the Supreme Court of the United States.) The machine for planing boards and plank was constructed as shown by a model produced on the hearing by the plaintiff, and by the machine itself on the hearing by the defendant. (The same are certified by the clerk of the court, and may be used on argument before [the] Supreme Court of the United States.)

8. That letters patent were issued to the defendant on the 13th day of March, 1849, which are referred to in, and a copy of which is annexed to, his answer herein.

On the final hearing, the following question occurred, to wit:—

*261] Whether, according to the true construction of the Woodworth *patent, as amended, the machines made or used by the defendant, at the time of filing the bill, or either of them singly, do or do not infringe the said amended letters patent.

On which question the opinions of the judges were opposed.

Whereupon, on a motion by William H. Seward and St. George Tucker Campbell, plaintiff's counsel, it was ordered

that the point on which the disagreement hath happened may, during the term, be stated, under the seal of the court, to the Supreme Court to be finally decided.

R. C. GRIER.
J. K. KANE.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case comes before the court upon a certificate of division, and has been submitted on printed arguments.

The plaintiff, who claims as assignee of what is generally called the Woodworth patent, filed a bill in equity, praying an injunction against the defendant to restrain him from using a certain machine, in which, as the complainant charged, boards were planed, tongued, and grooved in the same manner as in the Woodworth machine; the machine of the defendant operating in the same way in every respect as the one for which the complainant held the patent.

The defendant, in his answer, denied that his machine was substantially like and upon the plan of the Woodworth machine. Other defences were also taken in the answer. But it is not necessary to notice them, as they do not concern the question certified.

A great mass of testimony was taken on both sides in the Circuit Court, and models and drawings produced of the two machines; all of which have been sent up for the examination and consideration of this court, with the certificate of division.

On the final hearing of the case, the judges of the Circuit Court differed in opinion on the following question: "Whether, according to the true construction of the Woodworth patent, as amended, the machines made or used by the defendant at the time of filing the bill, or either of them singly, do or do not infringe the said amended letters patent?"

The question thus certified is one of fact, and has been discussed as such in the arguments offered on both sides. It is a question as to the substantial identity of the two machines. And its decision must depend upon the testimony of witnesses; the examination of the models and drawings, or of the machines themselves; and the application of mechanical principles and combinations, which the court could learn only *from the testimony of persons skilled in the [*262 science of mechanics.

The jurisdiction of this court to hear and determine a question certified from the Circuit Court is derived altogether from the act of 1802, ch. 31, § 6 (2 Stat. at L., 159); and that act evidently gives the jurisdiction only in cases where the judges

of the Circuit Court differ in opinion on a point of law. The language of the whole provision upon this subject so clearly requires this construction, that it is unnecessary to comment on it. And it would be utterly inconsistent with the well known and established proceedings of courts of equity, as well as courts of common law, to take out of a case during its progress a single question of fact, and send it here with the evidence upon that point only, for the final decision of this court. In the case before us, a great number of facts must be ascertained and determined from the evidence, before a final opinion could be formed upon the question certified.

Besides, this act of Congress has been in force for nearly half a century, and has been repeatedly acted on in this court; and it has uniformly received the construction we now give to it. In the multitude of questions which have been certified, this court has never taken jurisdiction of a question of fact. And in a question of law it requires the precise point to be stated, otherwise the case is remanded without an answer.

The question now certified being one of fact, we have no jurisdiction; and the case must therefore be remanded to the Circuit Court, to be there proceeded in as law and justice may require.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. And it appearing to this court, upon an inspection of the said transcript, that no point in the case, within the meaning of the act of Congress, has been certified to this court, the point or question being one of fact, it is thereupon now here ordered and decreed by this court, that this cause be, and the same is hereby, dismissed, and that this cause be, and the same is hereby, remanded to the said Circuit Court, to be proceeded in according to law.

*JOHN DOE, LESSEE OF JACOB CHEESMAN, PETER CHEESMAN AND SARAH, HIS WIFE, BEERSHEBA PARKER, WARD PEARCE, JOHN CLARK AND MARGARET, HIS WIFE, ANN JACKSON, WILLIAM JACKSON, SEWARD JACKSON, AND MARY JACKSON, —— WATSON AND SARAH, HIS WIFE (LATE SARAH PEARCE), WILLIAM PEARCE, WARD PEARCE, MIRABA EDWARDS, JAMES EDWARDS, RICHARD PEARCE, WILLIAM, JAMES, AND MARGARET PEARCE, THOMAS MORRIS AND MARY, HIS WIFE (LATE MARY PEARCE), ELIZABETH POWELL (LATE ELIZABETH PEARCE), JACOB WILLIAMS AND ELIZABETH WILLIAMS, SARAH SMALLWOOD, DEBORAH BRYANT, GEORGE L. HOOD AND LETITIA, HIS WIFE, IN HER RIGHT, JOSEPH SMALLWOOD, JOSEPH HURFF, JANE TURNER, JOHN BROWN AND MARY, HIS WIFE, IN HER RIGHT, WILLIAM SMALLWOOD, ISAAC HURFF AND ELIZABETH, HIS WIFE, IN HER RIGHT, RICHARD SHARP AND MARIAM, HIS WIFE, IN HER RIGHT, RANDALL NICHOLSON AND DRUSELLA, HIS WIFE, IN HER RIGHT, JACOB MATTISON AND JEMIMA, HIS WIFE, IN HER RIGHT, JOSEPH NICHOLSON AND MARIAM, HIS WIFE, IN HER RIGHT, THOMAS PEARCE, AND MATTHEW PEARCE, (ALL CITIZENS OF NEW JERSEY,) PLAINTIFF IN ERROR, *v.* THOMAS WATSON, DEFENDANT.

Where a testator made certain devises to his two grandchildren, "provided, and the legacies herein before devised are upon this special condition, that, if both my said grandchildren shall happen to die under age and without any lawful issue, then it is my will that three fourth-parts shall be equally divided between Sarah Smallwood and others," &c., and the two grandchildren lived many years after they arrived at full age, and then both died without issue, the devise over to Sarah Smallwood, &c., never took effect, because the two grandchildren both arrived at full age.

The plaintiffs below having claimed the whole as the heirs of Sarah Smallwood, the court instructed the jury that they could not recover. But the plaintiffs below claimed, in this court, that they were entitled to recover a part, because they were a portion of the heirs of the two grandchildren. This point was not made in the court below, and therefore cannot be made here.[1]

The Supreme Court of Pennsylvania decided, with regard to this very will, that the devise over to Sarah Smallwood never took effect. This decision was made in 1795, and the acquiescence of half a century would seem to close all litigation under the will. But even if it did not, this court is of the same opinion.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Pennsylvania.

[1] S. P. *Barrow* v. *Reab*, 9 How., 366; *Newell* v. *Nixon*, 4 Wall., 572; *Railroad Co.* v. *Lindsay*, Id., 650.

It was an ejectment brought by the lessee of Cheesman, &c., to recover certain lots in the city of Philadelphia. As the defendant below offered no evidence but contested the validity of the title shown by the plaintiff, it is necessary to set that forth. It was as follows, viz.:—

The plaintiff gave in evidence the deed of conveyance from the Proprietors of Pennsylvania, Thomas and Richard Penn, to James Parrock, bearing date 5th September, 1749, under the great seal of the Province.

*264] *Also, the last will and testament of James Parrock, bearing date 24th May, 1754, admitted to probate 24th January, 1755.

One of the arguments of the counsel for the plaintiff in error being founded upon the presumed intention of the testator, as gathered from a comparison of several clauses in the will, it becomes necessary to insert them.

The devises contained in the will material to this controversy are, in substance, the following:—

1. To his wife, Hannah Parrock, of his dwelling-house, kitchen, and lot of ground in Second and Sassafras Streets, together with various rent charges issuing out of lots of land, to hold during her life, with remainder of the said dwelling-house, kitchen, and lot of ground, and certain of those rent charges, to his granddaughter, Sarah Parrock, and her heirs; and as to the other of said rent charges to his grandson, John Parrock, and his heirs.

2. To his wife, Sarah Parrock, for life, the use of certain goods and chattels; and to his grandson, John Parrock, certain other goods and chattels.

3. To his grandson, John Parrock, and his heirs, his bank and water lot in the Northern Liberties of said city, in breadth 50 feet, and depth into the Delaware 254 feet, and his piece of upland and meadow in the Northern Liberties of about fifty-six acres, and his bank and water lot in said city, in breadth 71 feet, in length or depth into the Delaware River 250 feet; also certain rent charges.

4. To his granddaughter, Sarah Parrock, and her heirs, a tenement and lot of ground, adjoining the messuage and lot before devised to her; also another piece of ground, in breadth, north and south, 22 feet, in length and depth, east and west, 51 feet, bounded westward by an alley, &c., northward by M. Hilliga's lot, &c.; also his bank and water lot in said city, in breadth 40 feet, in length 250 feet, into the River Delaware, bounded by Sassafras Street, by Front Street, and by Leeches' lot; with certain other rent charges.

5. He then devised to his said granddaughter Sarah, and

his said grandson John, all that his pasture or piece of land in the Northern Liberties, by Oldman's land, Daester's land, and the York road, containing three acres, to be equally divided between them, to said John and his heirs, and to said Sarah and her heirs.

6. The testator then devised, in these words and figures:—

"And I do hereby empower and order my said executors, and the survivor of them, to sell and dispose, as soon as my said grandchildren shall come of age, all that my piece or lot *of ground, situate on the south side of Vine [*265 Street aforesaid, about seventy-one feet from said Second Street corner, and extending east sixteen feet and one half, to Preserve Brown's lot; south, fifty-one feet, to John Denton's lot; west, by said Denton's lot, sixteen feet and an half; and north, fifty-one feet, by John Marle's lot; together with the appurtenances, to any person or persons that will purchase the same, and for the best price that they can reasonably get; to hold to such purchaser or purchasers, his heirs and assigns, for ever; and to give good deeds, or other sufficient conveyances; and the moneys arising by reason of said sale shall be equally divided between my said two grandchildren, John and Sarah Parrock, share and share alike."

7. He devises a house and lot to "Mary Parrock, the widow of my son John Parrock, deceased, and mother of my said grandson, John Parrock," and to Lydia Cathcart, a house and lot,—"to hold the said messuage so devised to said Mary Parrock during the term of her natural life, if she shall so long continue my said son's widow. And to hold the said last-mentioned messuage unto the said Lydia Cathcart, during the term of her natural life, if she shall so long continue a widow. And from and immediately after their, or either of their (the said widows) decease, day, or days of marriage, then I give and bequeathe all and singular the said two messuages unto my said grandson, John Parrock, to hold to him and his heirs and assigns forever."

8. The testator gives pecuniary legacies to said Mary Parrock and Lydia Cathcart; to the children of John Smallwood, deceased, his wearing apparel; and pecuniary legacies to the children of William and Mary Paschal; to Sarah Smallwood, the widow of John Smallwood, deceased, and to Sarah James and Hannah James, he gives pecuniary legacies.

9. "And it is my will that the several and respective legacies herein before devised unto my grandson John Parrock, and unto my granddaughter Sarah Parrock, shall be paid and delivered to them as they shall respectively come of age."

10. The testator devised all the rest and residue of his per

sonal estate unto his wife Hannah, his said grandson John, and his granddaughter Sarah, to be equally divided between them.

11. "Provided always, nevertheless, and the several legacies herein before devised unto my said grandson John Parrock, and my said granddaughter Sarah Parrock, are on this special condition, that if both my said grandchildren shall happen to die under age, and without any lawful issue, then it is my *266] will " that the one fourth part of all and singular the real and personal *estate unto them herein before devised shall go to the monthly meeting of the people called Quakers, at Philadelphia; and the other three parts of said real and personal estate shall be equally divided between "the said Sarah Smallwood, the widow of John Smallwood, and their children; the children of Thomas Smallwood; the children of Benjamin Richards; the children of William Paschal, deceased; the said Sarah Paschal, said William Paschal; widow Lydia Cathcart and her children; Joseph Fordham and his children; Richard Fordham and his children; the children of Isaac Ashton, deceased; Sarah Thomas and her children; Mary Lee and her children: Lydia Davis and her children; John Spencer and his children, and to the survivor of them, and to the heirs and assigns of such survivors or survivor, as tenants in common, (and not as joint tenants,) forever; anything heretofore contained to the contrary thereof in any wise notwithstanding."

In addition to that written evidence, the lessors of the plaintiff gave evidence by the mouths of witnesses, conducing to prove that the granchildren of the testator, John Parrock and Sarah Parrock, both died without issue and unmarried; that both said John Parrock and Sarah Parrock had attained full age before their respective deaths, and died long after the death of the testator; that said John Parrock died about the year 1790; that Peter Cheesman and wife (who was Mary Smallwood) were both related to John Parrock,—said Peter Cheesman married his relation; that John Smallwood and James Parrock were half-brothers; with other evidence of the genealogy of the lessors of the plaintiff; and that John Smallwood was dead when the will of James Parrock was made.

The defendant gave no evidence.

The counsel for the plaintiff then prayed the court to give the following instruction to the jury, viz.:—

"If the jury believe the evidence given by the plaintiffs of pedigree, then, under the true construction of the will of James Parrock, the plaintiffs are entitled to recover; it being proved by plaintiffs that both John Parrock, the grandson,

and Sarah Parrock, the granddaughter, died over age, and without issue."

But the said learned judges refused to charge the jury as so requested, and gave in charge to the jury, that under the said will the plaintiffs could not recover, inasmuch as the devise over to plaintiffs' ancestors, in the said will mentioned and contained, never took effect, by reason of the devisees therein named, viz., John Parrock and Sarah Parrock, having both arrived at full age.

To this instruction the counsel for the plaintiff excepted, and *upon it brought the case up to this court. [*267
The jury, of course, found a verdict for the defendant.

It was argued by *Mr. Bibb*, for the plaintiff in error, and by *Mr. Wharton* and *Mr. Meredith*, for the defendants.

Mr. Bibb made the following points:—

I. That the charge as actually given by the court was erroneous, because it limited and confined the derivation of title of the lessors of the plaintiff solely to the question of their being devisees of James Parrock, to the total exclusion of the right of each and every of the lessors, as heir or heirs of either said Sarah Parrock or of said John Parrock, the immediate devisees of James Parrock, who, or one of which said grandchildren, became the stirpes or root of descent and inheritance.

II. That the court erred in the construction of the will and testament of James Parrock as given in charge to the jury, and in refusing the charge as moved by the counsel for the plaintiff.

It is not necessary to state *Mr. Bibb's* argument upon the first point, because this court decided that the point had not been made in the court below, and therefore could not be made here.

III. That the court erred in the construction of the will and testament of James Parrock, as given in charge to the jury, and in refusing the charge as moved by the counsel for the plaintiff.

This leads to the inquiry into the true intent of the testator. The intention of the testator is to be sought upon the whole instrument, taken in all its parts as one whole. The words must follow the intent of the devisor. The sentences may be transposed to preserve the meaning of a will. One part of a will shall be expounded by another.

These rules are to be observed:—"1st. No will ought to be construed *per parcellus*, but by entireties. 2d. To admit

of no contrariety or contradiction. 3d. No nugation or any nugatory thing, ought to be in a will." 8 Vin. Abr., *Devise F. a*, p. 181, pl. 11, 12, 13; 5 Bac. Abr., *F.*, p. 522, pl. 13; *Sparks* v. *Purnell*, Hobart, p. 75, pl. 93; *Bamfield* v. *Popham*, 2 Freem., 267; *Frogmorton* v. *Holyday*, 3 Burr., 1622.

To effectuate the intent of the testator, the word "or" shall be taken for "and," and the word "and" for "or." Out of the multiplicity of decisions and examples on that of "or" instead of "and," and "and" instead of "or," the following will suffice:—*Jackson* v. *Jackson*, 1 Ves., Sr., p. 217, case 113; *Maberly* v. *Strode*, 3 Ves., 450–454; *Bell* v. *Phyn*, 7 Ves., 458; *Read* v. *Snell*, 2 Atk., 642, case 351; 8 Vin. Abr., *Devise F. a*, 2, p. 187, pl. 1.

*268] *Construing the will of James Parrock by the rules aforementioned,—not looking to this or that parcel, or this or that devise alone, but viewing all its parts as one whole, to find the intent of the testator,—the just conclusions are,—

1st. That if his grandson John had died leaving issue at his death, that issue should have taken the part devised to him. So, likewise, as to the part devised to the granddaughter Sarah, if she had died leaving issue at her death, her issue would have taken that part. That intent is manifested by the devises to them respectively, and their heirs, in the fore part of the will.

2d. That the testator intended, by the after clauses in his will, to qualify the estates respectively devised to his said grandchildren, both real and personal, by annexing the contingency to each estate, of having lawful issue of their respective bodies living at their respective deaths.

3d. That he intended, if the one or the other of said grandchildren should die, leaving no issue lawfully begotten, the survivor should take the whole, subject to the contingency of leaving lawful issue at his or her death.

4th. That, in the event that both his said grandchildren should die leaving no lawful issue, then the estate, real and personal, should go, one fourth to the Quaker Society at Philadelphia, and the other three fourths to be equally divided between the persons named in the devise over to Sarah Smallwood and others.

5th. That the testator intended to give to each of his said grandchildren only estates tail in the lands; and that the survivor of the two should, in case of the prior death of the other, without leaving lawful issue at his or her death, take but an estate tail, or an estate subject to the executory devise.

6th. The testator did not intend to give to either of his said grandchildren a clear, unencumbered, vendible estate, upon which either could raise money by sale at full age; but intended to continue and perpetuate the estate in the family, as far forth as the law would tolerate such a perpetuity; and so intending, he therefore empowered and ordered his executors to sell a specified parcel of his real estate "as soon as my said grandchildren shall come of age," and divide the money thence arising equally between his said grandchildren.

Mr. Wharton and *Mr. Meredith*, for defendant in error.

The only question before the court below was the construction of the will of James Parrock. The plaintiff's lessors pretended no other title than that of devisees of the said James Parrock. They did not claim, nor pretend to claim, as heirs at law, or *statutory heirs, of John and [*269 Sarah Parrock, or either of them. After the evidence on their part was closed, (the defendant having offered none,) the plaintiffs' counsel requested the court to charge the jury, that, "if the jury believe the evidence given by the plaintiffs of pedigree, then, under the true construction of the will of James Parrock, the plaintiffs are entitled to recover; it being proved by plaintiffs, that both John Parrock, the grandson, and Sarah Parrock, the granddaughter, died over age, and without issue." The court refused so to charge, but instructed the jury that, under the will, the plaintiffs could not recover, inasmuch as the devise over to the plaintiffs' ancestors never took effect. And to this charge the plaintiffs excepted; and it is the only exception or point of law arising from the record. So that the plaintiffs in error cannot now raise a new point in this court, which they never took below, and thus shift their ground of claim and title. Their evidence was directed to the point of establishing their right as heirs of the devisees named in the will, and not as heirs of John and Sarah Parrock, and they made out no such title by their evidence.

Then, as to the construction of the will of James Parrock. What was the intention of the testator?

He had given certain property to his wife, for life; and, after her decease, he had devised certain portions of it to his grandson, John, in fee, and certain other portions of the same to his granddaughter, Sarah, in fee. With respect to the Vine street property, he had ordered that to be sold by his executors, so soon as John and Sarah came of age, and the money arising from the sale to be equally divided between the two grandchildren. There was, thus, with respect to this property, an equitable conversion of the realty into personalty,

in case the devisees attained their majority. See *Burr* v. *Sim*, 1 Whart. (Pa.), 252; *Simpson* v. *Kelso*, 8 Watts (Pa.), 247; *Reading* v. *Blackwell*, 1 Bald., 166. Having thus provided for his two grandchildren, he looked to the contingency of both dying under age, and without issue; and, in that event, and in that event alone, he declared that one fourth of the property devised to them should go to the monthly meeting of the people called Quakers, at Philadelphia, and the other three fourths should be divided between Sarah Smallwood and the other persons named and described in the will.

The title of the plaintiffs, even if they should establish their pedigree, depends altogether upon their showing that both John and Sarah Parrock died under age, and without any lawful issue. And upon the trial they distinctly showed, that neither of said devisees died under age. Where, then, is their title?

*270] *The construction of this will is settled by adjudicated cases, in Pennsylvania and elsewhere. *Lessee of Cheesman* v. *Wilt*, 1 Yeates (Pa.), 411, in 1795, is a case upon this very will; and was an ejectment for part of the property claimed under the executory devise to the plaintiff's lessors. The Supreme Court of Pennsylvania held the case to be "extremely clear," and that the remainders could only take effect upon the happening of both contingencies, namely, the dying under age and without issue. Having no doubt, the court refused to reserve the point upon the construction of the will.

In *Welch* v. *Elliott*, 13 Serg. & R. (Pa.), 205, under a devise of certain land to the testator's son, Robert, after the death of his mother, and in case Robert "departs this life before he is of age, or without lawful issue," the land was given to another son, in fee, upon certain conditions. Robert having attained the age of twenty-one, but died without issue, it was held that he took an estate in fee-simple indefeasibly. Chief Justice Tilghman, in this case, (p. 206,) says,—"That the estate in fee of Robert would have become indefeasible, either by his attaining the age of twenty-one or having issue, has been so repeatedly decided, that, on that point, I will only refer to two cases." The cases referred to by him are *Holmes* v. *Holmes*, 5 Binn. (Pa.), 552, and *Hauer* v. *Sheets*, 2 Id., 532.

In the last of these cases, under a devise to one son of testator, F., and in case he should die under the lawful age of twenty-one, *or* without issue, his share should go to another son, P., it was held that *or* should be construed *and*, and that F, having attained twenty-one, and died afterwards without

issue, an indefeasible fee vested in him, and descended to his heir at law. "This has been the uniform construction of this clause in wills," says Tilghman, C. J. (2 Binn. (Pa.), 544), from the case of *Price* v. *Hunt*, Pollexfen, 645, in the year 1684. To the same effect are *Carpenter* v. *Heard*, 14 Pick. (Mass.), 449, and *Dallam* v. *Dallam*, 7 Har. & J. (Md.), 220, and many other cases.

There was no looking on the part of the testator to an indefinite failure of issue, as one of the contingencies. On the contrary, the intent was, to provide for this contingency within a limited time, namely, at the death of the devisees; inasmuch as the devise over was to persons in being. But the rule of construing the first devise an estate tail has no application, where the contingency mentioned in the will is that of "dying under age and without issue;" for, as is shown by the authorities, the estate becomes an indefeasible fee in the first taker, upon the occurrence of either of the two events.

*Mr. Justice McLEAN delivered the opinion of the [*271 court.

This is a writ of error, which brings before us a judgment of the Circuit Court of the Eastern District of Pennsylvania.

The lessors of the plaintiff brought an action of ejectment to recover certain premises, generally described in the declaration, and situated in the city of Philadelphia. To sustain the right claimed by the plaintiff, a deed of conveyance from Thomas and Richard Penn, the original proprietors of Pennsylvania, for the premises in controversy, dated the 5th of September, 1749, to James Parrock, was given in evidence. The will of James Parrock, dated the 24th of May, 1754, was then read to the jury, in which, after making several devises to his granchildren, John Parrock and Sarah Parrock, their heirs and assigns, he adds,—"Provided always, and the legacies hereinbefore devised to the said John and Sarah are upon this special condition, that if both my said grandchildren shall happen to die under age and without any lawful issue, then it is my will that one fourth part of all and singular the real and personal estate to them before devised shall go to the monthly meeting of the people called Quakers; and the other three fourth parts to be equally divided between Sarah Smallwood and others, and to the survivors or survivor, as tenants in common forever."

It was proved that John Parrock and Sarah Parrock lived many years after they arrived at full age, and that both died without issue, long after the death of the testator. Evidence

was offered conducing to prove that the Smallwoods named in the will descended from John Smallwood, the half-brother of the testator, and that the lessors of the plaintiff were connected with the persons to whom the devise over was made. No evidence was given by the defendant. And the lessors of the plaintiff prayed the court to instruct the jury: "If they believe the evidence given by the plaintiffs of pedigree, then, under the true construction of the will of James Parrock, the plaintiffs are entitled to recover; it being proved by the plaintiffs that both John Parrock, the grandson, and Sarah Parrock, the granddaughter, died over age and without issue."

"But the court refused to charge the jury as so requested, and gave in charge to them, that under the said will the plaintiffs could not recover, inasmuch as the devise over to plaintiffs' ancestors, in the said will mentioned and contained, never took effect, by reason of the devisees therein named, viz., John Parrock and Sarah Parrock, having both arrived at full age." To which an exception was taken.

The form of the charge prayed is not free from objection. *272] It assumes the sufficiency of the evidence to prove the heirship *of the lessors of the plaintiff, if the jury should believe it. Now the evidence was somewhat vague and uncertain, and the jury might well have doubted whether the heirship was proved. But the instruction given waives this objection. From the instruction, as well as the prayer, it is clear that the claim of heirship was as descendants of the persons named in the will, to whom the property was devised over.

In the argument here, the counsel for the plaintiff asks the reversal of the judgment, on the ground, that the instruction was against the right of the lessors, or any part of them, to recover, although proved to be the heirs at law of John and Sarah Parrock.

The attention of the Circuit Court was not drawn to this point, no instruction was asked in regard to it, and it cannot now be made. The construction turned upon the contingent devise, and as that was held not to have taken effect, the court instructed the jury that the lessors of the plaintiff could not recover. This instruction was explicit, and could not have been misunderstood by the counsel in the Circuit Court; and as this was excepted to, and no other one prayed, it presents the only question for our consideration.

This devise was brought before the Supreme Court of Pennsylvania at January term, 1795, in the case of the *Lessee of Cheesman* v. *Abraham Witt*, and the court then held that the devise over did not take effect. They decided "that the

remainders over could only take place on the happening of both contingencies,—the grandchildren who were the primary devisees dying under age and without issue." 1 Yeates (Pa.), 411.

A decision thus made, and which seems to have been acquiesced in for more than half a century, within which time the property by descent or otherwise must have passed through the hands of persons who belonged to two or three generations, and which has necessarily become a rule of property, would seem to close all litigation under the will. But if the question remained open and unaffected by the lapse of time, the change of owners, and the great increase of value in the property, we should have difficulty in coming to any other decision than the one above stated.

We assent to the rule, that, in construing a will, the intention of the testator must govern. And that intention is to be ascertained from the whole instrument. If the intent of the testator be apparent, effect will be given to it, though he may have used inappropriate terms to attain his object. Under such circumstances, the conjunctive "and" may be read as the disjunctive "or," or the disjunctive may be changed into the conjunctive. *But this latitude of construction is never exercised where the language of the will is explicit, and the intent of the testator is not doubtful. In such a case, the import of the words used must be taken. [*273

In the fore part of the will, specific devises are made of real property to his two grandchildren by the testator, and when "they shall come of age" he directs his executors to sell a certain lot and divide the proceeds between them; and certain other pecuniary legacies are given to them to be paid at the same time; also, they are declared to be the residuary legatees of the testator. The condition then follows, that "if both my grandchildren shall happen to die under age and without any lawful issue, then it is my will that," &c. This devise over includes the personal as well as the real estate devised.

That the testator intended to give the property devised to his grandchildren and to their issue is clear, and from this it is argued, with some force, that he intended the devise over to take effect on the contingency that they should die without issue, though after they become of full age. To effectuate this, it would be necessary to change the word "and" into "or," so that the devise over should read, "if both my grandchildren shall happen to die under age, *or* without any lawful issue," &c.

To this reading is opposed the explicit language of the tes-

tator, which limits the condition of the devise over to the death of his grandchildren under age and without any lawful issue. These two events must happen, as constituting the contingency on which the devise was to take effect. The language is so explicit, and the intention of the testator so obvious, that it would seem he could not have been mistaken. Is there any thing in any part of the will to control this language?

From the specific devises to his grandchildren and to their issue by the testator, his intention is inferred, in opposition to the language used, that on their death, at any time, without issue, the devise over was to take effect. This view is not sustained by the tenor of the will.

Several of the legacies to the grandchildren were money, to be paid when they became of full age. These, as well as the real estate, were devised over "on their death under age and without lawful issue." Now is this devise consistent with the supposition that it was to take effect at any future period, however remote, on the death of the grandchildren? They were to receive their legacies, and the real estate devised to them, when of age; and they had a right to use their property, and especially their pecuniary legacies, as their conve-
*274] nience might require. *The testator could not have intended to devise over property thus received and necessarily appropriated. He did not intend to withhold from these children, the objects of his regard and of his bounty, during their lives, the use of the property he gave them. The nature of this devise goes strongly to show that the testator intended it should take effect "on the death of the grandchildren before they became of age, having no lawful issue."

The judgment of the Circuit Court is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

JONATHAN M. REED, PLAINTIFF IN ERROR, *v.* THE PROPRIETORS OF LOCKS AND CANALS ON MERRIMAC RIVER, DEFENDANTS.

It is the duty of the court to give a construction to a deed so far as the intention of the parties can be elicited therefrom; but the doubt in the application of the descriptive portion of a deed to external objects usually arises from what is called a latent ambiguity, which has its origin in parol testimony and must necessarily be solved in the same way. It therefore, in such cases, becomes a question to be decided by a jury, what was the intention of the parties to a deed.[1]

Therefore, there was no error in the following instructions given by the court to the jury, viz.:—"That if the jury believed from the evidence, looking to the monuments, length of lines and quantities, actual occupation, &c., that it was more probable that the parties to the mortgage intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants."

Where a claim to land was maintained upon an uninterrupted possession of forty years, the death of the original holder and subsequent reception of rent by his widow, did not break the continuity of possession. She is liable to account for the rent to the heirs.

THIS case was brought up, by writ of error, from the Circuit Court of the state of Massachusetts.

It was a suit brought by Reed, a citizen of Michigan, against an incorporated company, called "The Proprietors of Locks and Canals on Merrimac River," in a plea of land, wherein the said Reed demanded against the proprietors a certain piece or parcel of land in the city of Lowell and state of Massachusetts, containing seven acres and one hundred and forty-two and a quarter square rods.

*The state of the case was this: [*275

It was admitted that the demanded premises were part of the farm of Thomas Fletcher, who died seized thereof in 1771, leaving a widow and two daughters, Rebecca and Joanna.

THOMAS FLETCHER.

REBECCA—JACOB KITTREDGE. JOANNA—BENJAMIN MELVIN.

In 1773, Rebecca married Doctor Jacob Kittredge, and removed to Brookfield, Worcester County, Mass., where they lived and died, he in the summer of 1813, and she in September, 1818,—leaving eight children and the heirs of two

[1] DISTINGUISHED. *Boardman et al.* 173. CITED. *Parkinson* v. *McQuaid*, v. *Lake Shore, &c., Ry. Co.*, 84 N. Y., 54 Wis., 478.

deceased children as their heirs at law, and under them the tenants claim to derive their title.

In 1777, Joanna married Benjamin Melvin, senior, who removed home upon the farm. She died in September, 1826, and he died in April, 1830, leaving seven children, as their heirs at law, under whom the plaintiff claims to derive his title.

On the 27th of April, 1782, two transactions occurred which were the source of this dispute. Kittredge and wife conveyed to Melvin one half of 130 acres (which appeared to be the paternal estate), for the consideration of £300. In order to secure the payment of this £300, Melvin (who now owned one half by virtue of the deed just mentioned, and the other half in right of his wife) united with his wife in executing upon the same day to Kittredge a mortgage of a part of the land which is thus described, viz.:—"A certain tract or parcel of land, lying and being in Chelmsford, in Chelmsford Neck, so called, in said county of Middlesex, containing by estimation one hundred acres, be the same more or less, lying altogether in one piece, without any division, except only one county bridle road, which runs through the northerly part of said farm or tract of land, and being a part of the real estate of Mr. Thomas Fletcher, late of said Chelmsford, deceased; together with all the buildings of every kind, and all the privileges, appurtenances, and commodities thereunto belonging, or in any wise appertaining.

The great question in the case was, whether or not this mortgage included the demanded premises. On the part of the plaintiff in error, who claimed under Melvin, it was contended that it did not, and that of course the residuum belonged to Melvin.

On the part of the tenants, it was contended that the mortgage included them, and if so, that the estate afterwards became absolute in Kittredge.

*276] *In 1789, Kittredge entered upon the property mortgaged, for condition broken, and on the 17th of April, 1789, leased the property to Melvin for one year, and on the 17th of April, 1793, renewed the lease for a year.

In 1794, Kittredge brought an action against Melvin to recover the premises, in which suit judgment was rendered by the Supreme Judicial Court of Massachusetts in favor of the plaintiff, and an *habere facias possessionem* issued on the 19th of April, 1796.

It is not necessary to state the vast number of leases and deeds, and other evidence, introduced into the cause by both sides, to show that the mortgage did or did not include the

demanded premises; because it will be perceived, by referring to the opinion of this court, that they considered the question to be one appropriately falling within the province of a jury, and not one of construction of a deed to be settled by the court.

The tenants also took defence upon another ground, namely, that if the demanded premises were not included in the mortgage of Melvin and his wife, dated April 27th, 1782, nor in the leases of 1789 and 1793, from Kittredge to Melvin, nor in the judgment of Kittredge against Melvin of 1796, yet the entry of Kittredge in 1796, and his ejectment of Melvin, his wife and family, operated as a disseizin of Melvin and his wife, and that, from the continued possession of Kittredge and his lessees, and their occupation and improvement of the demanded premises as a part of the Cheever Farm, and from the fact that every successive grantee occupied and improved them in the same manner, they would pass by the description contained in any of the deeds from the Kittredge heirs, or any of the subsequent deeds under which the tenants claim, and the heirs of both Kittredge and Melvin, and their wives, would be barred.

The title of those claiming under Melvin (as Reed, the present plaintiff in error, is already stated to have done) was brought formerly before the Massachusetts courts, as appeared by the following agreement, which was filed in the cause:—

"It is also admitted by the tenants, that the heirs of Benjamin and Joanna Melvin entered into the demanded premises in July, A. D., 1832, claiming the same; and in May, A D., 1833, commenced writs of entry upon their own seizin for the recovery of the same; and that they prosecuted the same suits until the April term of the Supreme Judicial Court, Middlesex county, A. D., 1835, when they became nonsuit; and thereupon commenced a writ of right, in which they joined, and prosecuted the same until the October term, Supreme Judicial Court, 1836, *when Rufus Melvin, one of the [*277 heirs, executed a release of said action to the tenant.

(Signed,) JOHN P. ROBINSON,
"*October* 31*st*, 1845. *Attorney for the Tenants.*"

In October, 1845, the cause came on for trial in the Circuit Court, when the jury found a verdict for the tenants. The court, however, gave certain instructions to the jury, which were excepted to, and are thus stated in the record.

"Upon this evidence the court gave full instructions to

the jury; and among them the demandant excepts to the following:—

"1st. That if they believed, from the evidence, looking to the monuments, length of lines, and quantities, actual occupation, &c., that it was more probable the parties to the mortgage of 1782 intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants.

"2d. That the verdict of a former jury introduced by the tenants was not evidence to control this case or the issue.

"3d. But if they should believe the testimony of James Melvin, that Doctor Jacob Kittredge pointed out on the land of his father certain monuments as the southern boundary of his mortgage, it would be strong evidence that the parties to the mortgage intended originally to limit the mortgage to the line from these monuments; and that this evidence was strengthened and supported by the other testimony concerning the boundary south on Jonathan Williams.

"4th. That if the tenants under their respective leases from Kittredge occupied and cultivated to the Tyler line, in such a manner as the owners of such land would ordinarily occupy and cultivate, and such an occupation had continued for the period of thirty years, it would constitute such an adverse possession as would bar the demandant's right to recover.

"5th. That the possession of the premises by said lessees, under the lease, was the possession of Kittredge, the lessor, and his heirs, he claiming to have a deed which included them, and having turned Melvin out of possession; if it was of such a character as amounted to a disseizin, it would in law enure to the benefit of Kittredge and his heirs, and would be the disseizin and adverse possession of the lessor.

"6th. That if the possession of Cheever and Thissell, in 1796, under Kittredge, included the demanded premises, and the same possession had been continued by the subsequent lessees, as the evidence tended to show it had been, down to *278] the entry of the heirs of Melvin and wife, in 1832, it constituted *in law such a continuity of possession as would bar the demandant's right to recover.

"7th. That there was evidence, not contradicted, of a claim to the premises, by Mrs. Kittredge, after the death of her husband, and of rents being paid to her; but if Mrs. Kittredge, after the death of her husband, forgetting she had signed the original deed, claimed said premises, and received the rent therefor by mistake, till the heirs or their guardians discovered she had signed the deed, and the rents were then settled with them, the continuity of adverse possession would not thereby

be disturbed; but there was no evidence of those rents which were paid to Mrs. Kittredge going to the heirs, or being repaid to them, except what is to be inferred from her will, and the tenants recognizing the title of the heirs of Kittredge after the widow's death, and taking deeds of them. That, on the death of Kittredge, his rights descended to his heirs at law, some of whom were minors; that they became entitled to them, and the rents and profits paid by the lessees; that if the tenants, who held leases from Jacob Kittredge, and entered under them, remained in possession after his death, they should properly in law be regarded as tenants holding at will, or by sufferance of or under his heirs; and if the tenants saw fit, for any part of the time, to pay rent to Mrs. Kittredge, the mother, or did it by mistake, and afterwards paid it to the heirs, or their guardians, and took deeds from them, such payments to her ought not to impair the rights of the heirs, or those claiming under them; but the whole transaction was evidence to be weighed by the jury of a continued occupation by the lessees for and in behalf of those entitled in law to the rights which Kittredge claimed when alive.

"To which instructions of the court, given as aforesaid, the said plaintiff at the trial excepted, and prayed this, his bill of exceptions, to be signed and sealed by the court. All which, being found true, the same is accordingly signed and sealed.

"In testimony whereof, I have hereunto set my hand and seal.

[SEAL.]

"LEVI WOODBURY,
Ass't Justice of Supreme Court."

Upon these exceptions, the case came up to this court.

It was argued by *Mr. Parker* and *Mr. Jones*, for the plaintiff in error, and *Mr. Robinson* and *Mr. Webster*, for the tenants.

The points made by the counsel for the plaintiff in error were the following:

As to the first instruction. That the presiding judge [*279
erred *in submitting the question of the extent of land embraced in the mortgage from Melvin and wife to Dr. Kittredge, to the jury, as he did.

1. Because the mortgage and deed of the same date from Kittredge and wife to Melvin, senior, constituted in law one transaction, and the mortgage, viewed in this connection, called for some limit short of the whole land described in the deed from Kittredge and wife, which fact the tenants were estopped

to deny; and if the jury were satisfied that the town bridle-road existed at the date of the transaction, at the place contended for by the plaintiff, and that it constituted as much of a division as the bridle-road expressly accepted by the parties as making a division,—the evidence showing no other division answering the call of the mortgage,—the town bridle-road became the southern boundary of the mortgage by intendment of law and legal construction, and the jury were bound to find it so; and the presiding judge should so have instructed them, instead of leaving to their decision the meaning of the language of the mortgage.

2. Because, if the jury believed the testimony of James Melvin,—viz., "That his father and Dr. Kittredge, just before the making of the first lease between them, went upon the land and established the stake and stones and black oak stump with stones on it, at the place testified to by him as the southern boundary of the land claimed by Kittredge,"—then this fact, with the subsequent indentures of leases between them, recognizing these monuments and the Williams land as the southern boundary of the land claimed by Kittredge, and the writ and judgment thereon, with the solemn and repeated recitals and statements contained in them, the admission of the tenants that the Williams land extended as far north as these monuments, and included the demanded premises, and the fact that Melvin subsequently, in November, 1794, repurchased the demanded premises of Williams for a valuable consideration, constitute in law a conclusive presumption, against Kittredge and all claiming under him, of the extent of the land then owned by Kittredge, aud that both Kittredge and all claiming under him were thereby estopped to say that Kittredge at that time owned the demanded premises, or that his mortgage included them. And the presiding judge should have so instructed the jury on the evidence.

3. Because the law gives a preference to actual monuments, over length of lines, quantities, &c.; and the presiding judge ought to have so instructed the jury.

4. The burden being upon the tenants to satisfy the jury *280] *that the mortgage from Melvin and wife to Kittredge included the demanded premises, the instruction of the presiding judge,—"That if, from the evidence, looking to monuments, length of lines, quantities, actual occupation, &c., the jury should believe that it was *more probable* that the parties to the mortgage of 1782 intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants,"—was wrong, and did not in law satisfy the burden of proof resting upon the tenants.

To Point No. 1:—*Levy* v. *Gadsby*, 3 Cranch., 180; *McCoy* v. *Lightner*, 2 Watts (Pa.), 347; *Welsh* v. *Dusar*, 3 Binn. (Pa.) 337; *Dennison* v. *Wertz*, 7 Serg. & R. (Pa.), 372; *Roth* v. *Miller*, 15 Id., 100; 4 Id., 279; *Fowle* v. *Bigelow*, 10 Mass., 384; *Adams* v. *Betz*, 1 Watts (Pa.), 425; *Poage* v. *Bell*, 3 Rand. (Va.), 586; *Doe* v. *Paine*, 4 Hawks. (N. C.) 64; *Cockrell* v. *McQuin*, 4 Mon. (Ky.), 69; *Hurley* v. *Morgan*, 1 Dev. & B. (N. C.), 425; *Waterman* v. *Johnson*, 13 Pick. (Mass.), 261; *Peyton* v. *Dixon*, Peck (Tenn.), 148; *Hart* v. *Johnson*, 6 Ohio, 87; *Etting* v. *Bank of United States*, 11 Wheat., 59; *Cherry* v. *Slade*, 3 Murphy (N. C.), 82; *Carroll* v. *Norwood*, 5 Har. & J. (Md.), 163; *Penington* v. *Bordley*, 4 Id., 458.

To Point No. 2, under the first instruction, we cite the following authorities:—*Boyd* v. *Graves*, 4 Wheat., 513; *Commonwealth* v. *Pejepscutt Proprietors*, 10 Mass., 155; *Houston* v. *Mathews*, 1 Yerg. (Tenn.), 116; *Wilson* v. *Hudson*, 8 Id., 398; 1 U. S. Dig. by Met. & Perkins, 474; *Carroll* v. *Norwood*, 5 Har. & J. (Md.), 163; *Smith* v. *Murphy*, 1 Tayl. (N. C.), 303; *Penington* v. *Bordley*, 4 Har. & J. (Md.), 457; *Bates* v. *Tymason*, 13 Wend. (N. Y.), 300; *Flagg* v. *Thurston*, 13 Pick. (Mass.), 145; *Cherry* v. *Slade*, 3 Murph. (N. C.), 82; *Clark* v. *Munyan*, 22 Pick. (Mass.), 410; *Slater* v. *Rawson*, 1 Met. (Mass.), 450; *Crosby* v. *Parker*, 4 Mass., 110; *Houston* v. *Pillow*, 1 Yerg. (Tenn.), 481; *Davis* v. *Smith*, Id., 496; 1 Greenl. on Ev., 18, 19, 25, 26; 4 Stark. on Ev., 30; *Braman* v. *Taylor*, 2 Ad. & Ell., 278, 289, 291; *Loinson* v. *Tremere*, 1 Id., 792; *Peletreau* v. *Jackson*, 11 Wend. (N. Y.), 117; 4 Kent Com., 261, *n*; *Carver* v. *Jackson*, 4 Pet., 83; *Shelly* v. *Wright*, Willes, 9; *Crane* v. *Morris*, 6 Pet., 598; *Stowe* v. *Wyse*, 7 Conn., 214; *McDonald* v. *King*, Cox, 432; *Henrick* v. *Johnson*, 11 Metc. (Mass.), 26; *Willison* v. *Watkins*, 3 Pet., 43; *Denn* v. *Brewer*, Cox, 182; *Kinsell* v. *Daggett*, 2 Fairf. (Me.), 309; *Dewey* v. *Bordwell*, 9 Wend. (N. Y.), 65; *Parker* v. *Smith*, 17 Mass., 413; *Gerrish* v. *Bearce*, 11 Id., 193; *Jackson* v. *Hasbrook*, 3 Johns. (N. Y.), 381; *Adams* v. *Barnes*, 17 Mass., 365; *Howard* v. *Mitchel*, 14 Id., 241; *Shelton* v. *Alcox*, 11 Conn., 290; *Howe* v. *Strode*, 3 Wils., 269; *Poole* v. *Fleger*, 11 Pet., 209; *Root* v. *Crock*, 7 Pa. St., 378; *Fitch* v. *Baldwin*, 17 Johns. (N. Y.), 161; *Singleton* v. *Whitesides*, 5 Yerg. (Tenn)., 18.

*And to the point that, as the tenants now hold under and are privy in estate with all the parties who established the boundary and dividing line as aforesaid, they are estopped to deny the line so established by the respective parties, the following:—Cox, 431; 6 How., 88; 2 Murph. (N. C.), 251; 2 Serg. & R. (Pa.), 44. [*281

To point No. 3, under the first instruction, we cite Graham on New Trial, 278, and cases there cited.

To point No. 4, under the same instruction, 1 Greenl. on Ev., 4; 1 Stark. on Ev., 14; Jackson on Real Actions, 157, 161.

As regards the second instruction. The presiding judge erred, because the verdict of a former jury introduced by the tenants was evidence to control this case and the issue.

We contend that the verdict of a former jury put in by the tenants, rendered against them in favor of a party under whom the present demandant claims, is evidence for the demandant in the present case; as it appears from the record, also put in by them, affirmatively, that such verdict was in all respects conformable to law. Such verdict is competent evidence. See *Filler* v. *Milliner*, 2 Johns. (N. Y.), 181; 4 Com. Dig., 89; *Outram* v. *Morewood*, 3 East, 446.

It is equivalent to an award of arbitrators upon a submission by the parties under a rule of court, which concludes the parties, and all claiming under them, by estoppel, as to boundary at least. *Goodridge* v. *Dustin*, 5 Metc. (Mass.), 363; *Shelton* v. *Alcox*, 11 Conn., 240, and the cases there cited.

That it inures to the present demandant. *Carver* v. *Jackson*, 4 Pet., 83; *Somes* v. *Skinner*, 3 Pick. (Mass.), 52.

As regards the third instruction. The demandant contends it was wrong, because, if the jury believed the testimony of James Melvin, then the monuments established by his father and Dr. Kittredge, with the Williams land, there being no evidence of any others answering the calls in the subsequent leases, writ, and judgment, were to be regarded by them as the southern line of the land embraced in the lease, writ, and judgment; and by the solemn recitals and statements made in them by Kittredge, the admission of the tenants that the Williams land included the demanded premises, and the subsequent repurchase of Williams by Melvin of the demanded premises, with the balance of the Williams lot, which the tenants now claim, and hold under that purchase, both Kittredge and all claiming under him were concluded and estopped to say that Kittredge at the time of these transactions owned any of the land recited and recognized in said
*282] leases, writ, and judgment as belonging to Jonathan Williams, and which lies immediately *south of the monuments aforesaid, or that his mortgage originally included it, and if it had, the fact was immaterial.

See cases cited to the first and second points under the first instruction.

But the tenants contend further, that, if the mortgage from Melvin and wife does not include the demanded premises,

they have acquired a title thereto by disseizin and the statute of limitations; that they and those under whom they claim have had the actual, open, notorious, and exclusive possession of the demanded premises under claim of title, with such legal privity of title between the successive occupants as will constitute a bar.

This position the demandant denies, and contends that the evidence, all of which touching this point appears upon the record, is entirely insufficient in law to constitute such a disseizin as to bar. (The counsel then went into an examination of the evidence.)

As regards the fourth instruction. The demandant will contend it was wrong,—1. Because the question submitted to the jury to decide necessarily involved a construction of the leases, which was matter of law, and should have been determined by the court. 2. Because such an occupation by the tenants, under their respective leases from Kittredge for the space of thirty years, would not necessarily constitute a bar to the demandant's right to recover in this case, even if a sufficient legal continuity of title in the lessors had been shown, especially the moiety derived from Mrs. Melvin, she having been under coverture. 3. Because there was no sufficient legal continuity of title shown to have existed in the lessors, through whom the tenants claim to derive their title, and because it assumed the existence of facts which the whole evidence in the case expressly negatived, was foreign and did not conform to the evidence in the case, and tended to mislead the jury.

As regards the fifth instruction. The demandant contends it was wrong, because the presiding judge assumed to tell the jury, "that Kittredge claimed to have a deed which included the demanded premises, and had turned Melvin out of possession," of which facts there was no evidence, but evidence showing directly the reverse; and that if there had been any evidence tending to show these facts, it was for the jury to pass upon; and that, without the existence of these facts, the possession of the demanded premises by the lessees under the lease was not the possession of Kittredge or his heirs, so as to constitute them disseizors except at the election of the true owner. And that even if these facts had been shown to have existed, they would not have operated a disseizin of [*283
Mrs. Melvin *during her coverture. And because the court left it to the jury to decide what facts constitute in law a disseizin.

As regards the sixth instruction. The demandant contends it was wrong,—1. Because the question submitted to the

decision of the jury involved a construction of the written leases, which was matter of law, to be determined by the court. 2. Because the evidence did not tend to show that *the same* possession, or any possession, possessing the same legal elements, or having the same legal effect, had been continued by the subsequent lessees, down to the entry of the heirs of Melvin and wife in 1832, or for any time sufficient to bar, and would not constitute in law such a continuity of possession as would bar the demandant's right to recover. 3. Because the question of legal continuity of title and possession submitted to the jury to decide was matter of law, and should have been decided by the court.

As regards the seventh instruction. The demandant contends it was wrong,—1. Because there was no evidence in the case from which the jury could properly infer the fact that Mrs. Kittredge ever settled with the heirs of Dr. Kittredge for, or paid, the rents which she had received from the tenant, or that the tenant repaid the rents to the heirs.

2. Because the possession and claim of Mrs. Kittredge, the widow, whether under a mistake or not, and express disclaimer on the part of the heirs, as disclosed by the evidence, which was uncontradicted, did interrupt and disturb the continuity of adverse possession, if any existed before.

3. Because the evidence shows that the last written lease from Kittredge to Cheever, the tenant, terminated in April, 1812, more than a year before Kittredge died, and if Cheever was tenant at all to Kittredge of the demanded premises, which the plaintiff denies, it was only a tenancy at will, which terminated by the death of Kittredge in 1813, and Cheever's remaining in possession afterwards, under the claim of the widow, and paying the rent to her,—the heirs of Kittredge, as appears, expressly disclaiming any title,—would not, against their wish and consent, make Cheever tenant at will or sufferance to them, or establish any other relation which should involuntarily enforce on the innocent heirs the character of wrong-doers and disseizors, and that the law would not properly regard them as such.

4. Because the whole transaction of the widow's claim and receipt of the rent, and express disclaimer on the part of the heirs, as shown by the evidence, was not evidence, to be *284] weighed by the jury, of a continued occupation by the lessees *for and in behalf of those entitled by law to the rights which Kittredge claimed when alive.

The demandant will further contend that the instructions aforesaid were unwarranted by the evidence, and misled the

jury, and that their verdict was against law and the evidence in the case, doing great injustice to the plaintiff.

To the second ground of the tenant's defence, the plaintiff cites in support of his exceptions to the fourth, fifth, sixth, and seventh instructions, the following authorities:—

To the point of submitting the construction of the leases to the jury. *Commonwealth* v. *Porter*, 10 Metc. (Mass.), 263, Graham on New Trial, 288; *McCormick* v. *Sisson*, 7 Cow. (N. Y.), 715; *Pangborn* v. *Bull*, 1 Wend. (N. Y.), 345; *Hill et ux* v. *Yates*, 8 Taunt., 182; and cases cited to point No. 1, under the first instruction.

What constitutes an actual ouster and disseizin, so that the statute begins to run? Mass. Stat. 1786, ch. 13, § 4; Mass. Rev. Stat., ch. 119, § 3; 2 Greenl. Ev., § 430; *Taylor* v. *Hord*, 1 Burr., 60; Cowp., 689; *Jerritt* v. *Weare*, 3 Price, 575; 4 Kent Com. (1st ed.), 482, 489; *Proprietors of Kennebec Purchase* v. *Springer*, 4 Mass., 416; *Same* v. *Laboree*, 2 Me., 275; *Little* v. *Libby*, Id., 242; *Same* v. *Megquire*, Id., 176; *Norcross* v. *Widgery*, 2 Mass., 506; *Coburn* v. *Hollis*, 3 Metc. (Mass.), 125; *Bates* v. *Norcross*, 14 Pick. (Mass.), 224; *Prescott* v. *Nevers*, 4 Mason, 326; *Poignard* v. *Smith*, 6 Pick. (Mass.), 172; *Brown* v. *Gay*, 3 Me., 126; *Gale* v. *Butler*, 3 Murph. (N. C.), 447; *Ross* v. *Gould*, 5 Me., 204; *Blood* v. *Wood*, 1 Metc. (Mass.), 528; 1 Roll., 663, L. 27; 6 Com. Dig., 27, *Seizin*, F. 4; Stearns on Real Actions, 6; *Ricord* v. *Williams*, 7 Wheat., 107; *Blunden* v. *Baugh*, Cro. Car., 302; *Goodright* v. *Forrester*, 1 Taunt., 578; *Doe* v. *Lynes*, 3 Barn. & C., 388; *Podger's* case, 9 Coke, 104; 5 Cow. (N. Y.), 374; 6 Johns. (N.Y.), 118.

That Melvin had acquired a life estate in his wife's half, and the statute would begin to run only as to him. 2 Bl. Com., 127; Co. Litt., 670. *Melvin* v. *Locks and Canals*, 16 Pick. (Mass.), 137; *Babb* v. *Perley*, 1 Me., 6; 15 Pick. (Mass.), 23; 22 Id., 565; 2 Cow. (N. Y.), 439.

There cannot be an actual ouster of the reversion, so that the statute will run during the continuance of the life estate. Stearns on Real Actions (2d ed.), 323; 1 Preston's Ab., 266; *Doe* v. *Elliot*, 1 Barn. & Ald., 86; 2 Kent. Com. (2d ed.), 110; *Tilson* v. *Thompson*, 10 Pick. (Mass.), 357; *Stevens* v. *Winship*, 1 Id., 238; *Jackson* v. *Schoonmaker*, 4 Johns. (N. Y.), 402; *Jackson* v. *Johnson*, 5 Cow. (N. Y.), 74; *Wallingford* v. *Hearl*, 15 Mass., 472; *Wells* v. *Prince*, 9 Id., 508; *Jackson* v. *Sellick*, 8 Johns. (N. Y.), 262; Starkie on Ev., 886, 887; Co. Litt., 39 *a*, 246 *a*, 246 *b*, 350 *a*, 351 *a*, 352 *a*, 356 *b*.

*That there must be a legal privity of title between successive occupants, so the one legally enters upon his [*285

predecessor, and not as a trespasser. Angell on Limitation, 88; *Potts* v. *Gilbert*, 3 C. C. R., 475; *Ward* v. *Bartholomew*, 6 Pick. (Mass.), 415; *Jackson* v. *Leonard*, 9 Cow. (N. Y.), 654; *Brandt* v. *Ogden*, 1 Johns. (N. Y.), 156; *Doe* v. *Hall*, Dowl. & Ry., 38; *Sargeant* v. *Ballard*, 9 Pick. (Mass.), 251; *Allen* v. *Holton*, 20 Id., 465; *Melvin* v. *Locks and Canals*, 5 Metc. (Mass.), 115; *Wade* v. *Lindsay*, 6 Id., 407.

That it is error for the court to instruct the jury that they may make inferences which the evidence does not warrant. Graham on New Trial, 271; *Harris* v. *Wilson*, 7 Wend. (N. Y.), 57; *Hollister* v. *Johnson*, 4 Id., 639; *Levingsworth* v. *Fox*, 2 Bay (S. C.), 520.

That on Kittredge's death Cheever's tenancy ceased, and he became tenant at sufferance. *Rising* v. *Stannard*, 17 Mass., 282; *Ellis* v. *Page*, 1 Pick. (Mass.), 42.

That between Cheever and the heirs at law there was no privity of title. Co. Litt., 170 *b*; 1 Cruise on Real Property, 288. That upon the heirs abandoning any prior dissezin by Kittredge became purged. *Small* v. *Procter*, 15 Mass., 495.

If the widow entered, she would be a new disseizor, as she had no right to enter as the successor of her husband. *Gibson* v. *Crehore*, 5 Pick. (Mass.), 146, 149; *Parker* v. *Obear*, 7 Metc. (Mass.), 24. That neither married women, nor minors, nor a *non compos mentis*, can become disseizors by adopting and consenting to the acts of others. 6 Com. Dig., 271, *Seizin*, F., 4; 1 Roll., 160, 161.

That the deeds, through which the tenants claim to derive title from the Kittredge heirs, did not include the demanded premises. 2 Bl. Com., 388; 6 Rules for Construing Deeds; *Ognel's case*, 4 Co., 50; Sheph. Touch., 248, 249; *Roe* v. *Vernon et al.*, 5 East, 51; *Doe* v. *Greatherd*, 8 East, 91; *Gascoyn* v. *Barber*, 3 Atk., 9; *Wilson* v. *Mowitt*, 3 Ves., 191; *Worthington* v. *Hylyer et al.*, 4 Mass., 191; *Barnard* v. *Martin*, 5 N. H., 536; *Woodman* v. *Lane*, 7 Id., 241; *Allen* v. *Allen*, 14 Me., 430; *Thorndike* v. *Richards*, 13 Id., 430; *Field* v. *Huston*, 21 Id., 69; *Jameson* v. *Balmer*, 20 Id., 425; *Low* v. *Hampstead*, 10 Conn., 23; *Benedict* v. *Gaylord*, 11 Id., 60; *Stearns* v. *Rice*, 14 Pick. (Mass.), 411, 412.

That the verdict of the jury was against law and the evidence in the case. *Bryant* v. *Commonwealth Ins. Co.*, 13 Pick. (Mass.), 543.

(The argument of the counsel for the tenants, tending to show from other leases and evidence, that the demanded premises were included in the mortgage, is omitted.)

II. The second position of the tenants is, that if the *demanded premises were not included in the mortgage of Melvin and his wife, dated April 27th, 1782, nor in the leases of 1789 and 1793, from Kittredge to Melvin, nor in the judgment of Kittredge against Melvin of 1796, yet the entry of Kittredge in 1796, and his ejectment of Melvin, his wife and family, operated as a disseizin of Melvin and his wife, and that, from the continued possession of Kittredge and his lessees, and their occupation and improvement of the demanded premises as a part of the Cheever farm, and from the fact that every successive grantee occupied and improved them in the same manner, they would pass by the description contained in any of the deeds from the Kittredge heirs, or any of the subsequent deeds under which the tenants claim, and the heirs of both Kittredge and Melvin and their wives would be barred.

It is the settled law of Massachusetts, that a married woman, by joining with her husband in a deed, may pass the lands of which the husband and wife are jointly seized, in her right. *Fowler* v. *Shearer*, 7 Mass., 14.

It is also the settled law of Massachusetts that the right of a married woman and her heirs to make an entry upon lands of which she has been disseized jointly with her husband, is absolutely barred after thirty years' adverse possession. Stat. of Mass., 1786, ch. 18, § 4; *Melvin* v. *Propr. of Locks and Canals*, 16 Pick. (Mass.), 161; *Same* v. *Same*, 5 Metc. (Mass.), 15; *Kittredge* v. *Same*, 17 Pick. (Mass.), 246.

A married woman may be disseized at the same time with her husband. *Podger's case*, 9 Co., 104; Runnington on Eject., 60; Adams on Eject., 48, 49, note; Jackson on Real Actions, 25; *Polyblank* v. *Hawkins*, 1 Doug., 329; *Registrum Brevium*, 197; Rastell's Entries, 318; Co. Litt., 30 *a*; 2 Inst., 242; *Langdon* v. *Potter*, 3 Mass., 219; Rolle's Abr., *Assize*, E. O., 13.

With respect to the Williams mortgage, and the testimony of James Melvin, as mentioned in the third instruction, the instruction of the judge was right, if it was not too favorable to the demandant, because Williams's mortgage was subsequent to Kittredge's, and could not be set up against it, if it included a portion of the same lands, as the tenants contend; and the testimony of James Melvin as to the southern boundary is totally inconsistent with the written documents made by the parties themselves at the time. This relates to the first and third instruction.

As to the second instruction, that the verdict of a former jury in the state court was not evidence to control this case,

the *tenants contend it was correct, because the judgment of the state court which contained this verdict was in favor of the tenants, notwithstanding this verdict.

In support of the fourth, fifth, and sixth instructions, the tenants will take the positions and rely upon the authorities cited before, under the second general head of this abstract, to which the court are referred.

As to the seventh instruction, the tenants make the following points:—That by the death of Kittredge, in 1813, the land descended to his heirs at law; that he died seized, the possession being in his tenant, Cheever; that Cheever continued in possession till after the death of Mrs. Kittredge, in 1818; that there was no evidence that Mrs. Kittredge was ever on the land after the death of her husband; that she was entitled to a life estate in one third part of the farm, and was, therefore, legally entitled to one third part of the rents; that she cannot be considered as an abator, because an abatement is an entry by a stranger, nor as a disseizor, because she did no act which can be construed as a disseizin of the heirs; that there was no evidence of any disclaimer of the heirs, nor any evidence of an adverse possession on the part of Mrs. Kittredge, but that the legal seizin remained in the heirs as it descended from their father. 5 Metc. (Mass.), 28–35.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiff in error was demandant below in a writ of entry, in which he claimed about eight acres of land in the city of Lowell.

The demandant claimed under Benjamin Melvin, who, it is admitted, was seized of the land in dispute, as part of a larger tract, in 1782. One undivided moiety of this tract Melvin held in right of his wife, and the other in his own right.

The tenants claimed under a mortgage given by Benjamin Melvin and wife to Jacob Kittredge, on the 27th day of April, 1782. In 1789, Kittredge entered under his mortgage, and leased the premises to Melvin. In 1796, Kittredge recovered the possession from Melvin on an action of ejectment, and had possession delivered to him by writ of *habere facias*.

From that time Kittredge and those claiming under him, now represented by the tenants or defendants in this action, claim to have had the peaceable possession of the demanded premises; and there is no evidence of any occupation by Melvin or his heirs, or claim thereto, till 1832, although they lived in the immediate neighborhood. On the trial below, the tenants relied on two grounds of defence, both of which they claim to have established by the evidence:—

*1. That the demanded premises were included in the mortgage given by Melvin and wife to Kittredge, in 1782.

2. That even if the land in controversy was not embraced within the deed of mortgage, yet that the entry of Kittredge in 1796, and the ouster of Melvin and wife, operated as a disseizin, and that by the uninterrupted and adverse possession of the tenants, and those under whom they claim, for more than thirty years before the entry of demandant, or those under whom he claims, his right of entry was barred by the statute of Massachusetts of 1786, ch. 13, § 4; which limits the right of any person under no disability to make an entry into lands, &c., to twenty years next after his right or title first descended or accrued, with a saving to femes covert, &c., of a right to make such entry at any time within ten years after the expiration of said twenty years, and not afterwards.

The court gave "full instructions to the jury" on the principles of law applicable to the complicated facts and somewhat contradictory testimony submitted to them on the trial; to certain portions of which the demandant's counsel excepted, and has here assigned as error.

We shall proceed to examine them in their order.

I. "That if the jury believed from the evidence, looking to the monuments, length of lines, and quantities, actual occupation, &c., that it was more probable the parties to the mortgage of 1782 intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants."

It is objected to this instruction, that it submits the construction of the deed to the jury; and permits them to conjecture the probable intention of the parties from facts and circumstances not contained in the deed. Whereas the intention of the parties is to be found in their deed alone, which it is the duty of the court to construe.

Taking this sentence of the charge as it stands, without reference to the facts of the case, it may be admitted that it affords some color to this objection. But when we look to the issue submitted to the jury, and the testimony exhibited by the record, the exception will be seen to be without foundation.

It is true, that it was the duty of the court to give a construction to the deed in question, so far as the intention of the parties could be elicited therefrom, and we are bound to presume that, in the "full instructions" which the record states were "given to the jury," and not contained in the bill, because no objection was made to them, the court performed that duty correctly. But after all this is done, it is still a question *of fact to be discovered from evidence [*289

dehors the deed, whether the lines, monuments, and boundaries called for include the premises in controversy or not. A deed may be vague, ambiguous, and uncertain in its description of boundary; and even when it carefully sets forth the lines and monuments, disputes often occur as to where those lines and monuments are situated on the ground; and it necessarily becomes a fact for the jury to decide, whether the land in controversy is included therein, or, in other words, was *intended* by the parties so to be.

The mortgage referred to by the court describes the land as follows:—"A certain tract or parcel of land lying and being in Chelmsford, on Chelmsford Neck, so called, in said county of Middlesex, containing by estimation one hundred acres, be the same more or less, lying altogether in one piece without any division, except only one county bridle-road, which runs through the northerly part of said farm or tract of land, and being a part of the real estate of Mr. Thomas Fletcher, late of said Chelmsford, deceased."

The description of the land conveyed by this deed is of the most vague and indefinite character; it sets forth no monuments to indicate the line which divides it from the remainder of the tract owned by the mortgagor, and not intended to be included in the deed.

Hence, the demandant, in order to show what land was intended by the parties to be included, produced witnesses to prove the existence in former times of another "bridle-road," which he contended was the southern boundary of the mortgaged land, because a hundred acres lay north of this road, and the land was described as intersected but by "*one* county bridle-road," which ran through the northerly part of the farm. He produced a witness, also, to prove that Kittredge, the grantee, had pointed out a certain monument near this road as marking his boundary.

The tenants contended that the deed was uncertain as to quantity, and did not call for the road as its southern boundary. They also gave evidence to show the actual practical location by the parties of the land included in the mortgage, as early as 1789, which included the eight acres in controversy. For this purpose they produced the leases from Kittredge to Melvin, the mortgagor, dated in 1789 and 1793, and subsequently to the other tenants of Kittredge, setting forth courses and distances which included the demanded premises, as they contended, and proved by witnesses a possession held accordingly since 1796.

It cannot be doubted, that, where a deed is indefinite, uncertain, or ambiguous in the description of the boundaries

of the *land conveyed, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown. The difficulty in the application of the descriptive portion of a deed to external objects, usually arises from what is called a latent ambiguity, which has its origin in parol testimony, and must necessarily be solved in the same way. It therefore becomes a question to be decided by a jury, what was the intention of the parties to the deed.

From this view of the case, as exhibited by the record, it clearly appears that the question, whether the demanded premises were included within the limits of the mortgage, or intended so to be, was submitted by the parties, and by the nature of the case, to the jury; and that, in order to a correct decision of the issue, the jury should be instructed to weigh the testimony as to the "monuments, length of lines, and quantities, actual occupation, &c.," and decide according to the weight of evidence. And such is the meaning, and no more, of the language of the court now under consideration. We can perceive no error in it.

II. The second matter of exception is to the instruction,— "That the verdict of a former jury, introduced by the tenants, was not evidence to control this case or the issue."

On the trial, the tenants gave in evidence the record of a former writ of entry, brought by Benjamin Melvin, Jr., against them in 1838, for this same land, on which a judgment was rendered in favor of the tenants. In the trial of that case, the question had been submitted to the jury "whether the demanded premises were intended by the parties to be conveyed by the deed of mortgage," and the verdict was in favor of demandant; the court, nevertheless, on other points reserved, gave judgment for the tenants.

We understand the principle asserted by the court in this instruction to be, that this verdict in favor of Melvin was not conclusive upon the defendants in this suit, and did not operate by way of estoppel as to the facts stated therein.

The correctness of this instruction cannot be questioned. For, assuming that a verdict and judgment in a writ of *entry sur disseisin* to be conclusive between parties and privies in Massachusetts, and that they operate by way of estoppel, yet the record in this case would have no such effect;—1st. Because it was neither pleaded nor given in evidence by the demandant for that purpose. 2d. All estoppels are mutual; the demandant was not party to the suit, nor privy except as to one fourteenth of the premises, and would not therefore have been *estopped as to the remainder; so, nei- [*291

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ther could the tenants. 3d. There was no judgment of the court upon the verdict, which alone could give it the force or effect of *res judicata*.

III. The third exception is to an instruction in favor of the demandant,—and ought not to have been taken or urged here.

IV. The fourth, fifth, sixth and seventh instructions excepted to have reference to the statute of limitations, and may be considered together. They are as follows:—

"4th. That if the tenants, under their respective leases from Kittredge, occupied and cultivated to the Tyler line, in such a manner as the owners of such land would ordinarily occupy and cultivate, and such an occupation had continued for the period of thirty years, it would constitute such an adverse possession as would bar the demandant's right to recover.

"5th. That the possession of the premises by said lessees, under the lease, was the possession of Kittredge, the lessor, and his heirs, he claiming to have a deed which included them, and having turned Melvin out of possession; if it was of such a character as amounted to a disseizin, it would in law inure to the benefit of Kittredge and his heirs, and would be the disseizin and adverse possession of the lessor.

"6th. That if the possession of Cheever and Thissell, in 1796, under Kittredge, included the demanded premises, and the same possession had been continued by the subsequent lessees, as the evidence tended to show it had been, down to the entry of the heirs of Melvin and wife, in 1832, it constituted in law such a continuity of possession as would bar the demandant's right to recover.

"7th. That there was evidence, not contradicted, of a claim to the premises by Mrs. Kittredge, after the death of her husband, and of rents being paid to her; but if Mrs. Kittredge, after the death of her husband, forgetting she had signed the original deed, claimed said premises, and received the rent therefor by mistake, till the heirs or their guardians discovered she had signed the deed, and the rents were then settled with them, the continuity of adverse possession would not thereby be disturbed; but there was no evidence of those rents which were paid to Mrs. Kittredge going to the heirs, or being repaid to them, except what is to be inferred from her will, and the tenants recognizing the title of the heirs of Kittredge after the widow's death, and taking deeds of them. That, on the death of Kittredge, his rights descended to his heirs at law, some of whom were minors; that they became entitled to them, and the rents and profits paid by the lessees; that if

*292] the tenants, *who held leases from Jacob Kittredge, and entered under them, remained in possession after

his death, they should properly in law be regarded as tenants holding at will, or by sufferance of or under his heirs; and if the tenants saw fit, for any part of the time, to pay rent to Mrs. Kittredge, the mother, or did it by mistake, and afterwards paid it to the heirs, or their guardians, and took deeds from them, such payments to her ought not to impair the rights of the heirs, or those claiming under them; but the whole transaction was evidence to be weighed by the jury of a continued occupation by the lessees, for and in behalf of those entitled in law to the rights which Kittredge claimed when alive."

We can perceive no error in these instructions, when taken in connection with the evidence exhibited by the record.

It cannot be denied, that an adverse possession may be kept up without a personal residence where the disseizor gives leases to tenants, puts them in possession, and receives the rents, claiming the land as his own.

The law is also well settled by the courts of Massachusetts, that the entry of a married woman is barred by the statute of limitations of that state, after thirty years, notwithstanding her coverture. Also that by the marriage the husband and wife become jointly seized of her real estate in her right, and their title must be so stated in pleading; and therefore, if a stranger enters and ousts them, it is a disseizin of both, and a right of entry immediately accrues to both or either of them. (See *Melvin* v. *Proprietors, &c.*, 16 Pick. (Mass.) 161; also 5 Metc. (Mass.), 15; and cases there cited.)

Nor can we discover any thing in the evidence in this case, that could entitle the demandant to maintain that the continuity of the adverse possession has been broken by the death of Kittredge, and the fact that the widow may have received the rents without objection for some time after his death.

There was no abatement by a stranger after the death of Kittredge, nor entry or disseizin of his heirs by the widow.

"If a guardian by nurture makes a lease by indenture to one who is already in under title of the infant, rendering rent to the guardian, which is paid accordingly, this is no disseizin; for there is no actual ouster consequent on such demise, and the rent paid to the guardian must be accounted for to the infant." (Roll. Abr., 659; Bac. Abr. tit. *Disseizin*, A.)

So if the mother, by mistake of her rights, and without objection, receives the rents jointly due to herself and children; this constitutes no ouster of them, she being liable to account to them.

*The judgment of the Circuit Court is therefore affirmed, with costs. [*298

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

AMÉDÉE MENARD'S HEIRS, PLAINTIFFS IN ERROR, v. SAMUEL MASSEY.

A concession, having no defined boundaries, made by the Lieutenant-Governor of Upper Louisiana in 1799, but not surveyed, cannot be considered as "property," and, as such, protected by the courts of justice, without a sanction by the political power, under the third article of the treaty with France made in 1803.

The Lieutenant-Governor of Upper Louisiana had the authority, as a subdelegate, to grant concessions, direct surveys, and place grantees in possession; but no perfect title to the land passed until the concession and a copy of the survey were delivered to the Intendant-General at New Orleans, and also a proces-verbal attesting the fact that the survey was made in the presence of the commandant, or in that of a syndic and two neighbors. On these the legal title was founded, and then perfected and recorded.[1]

Upon the transfer of Louisiana, the United States succeeded to all the powers of the Intendant-Generals, and could give or withhold the completion of all imperfect titles at their pleasure. In order to exercise this power with discretion, Boards of Commissioners were established in order to enlighten the judgment of Congress, and special courts were organized in which claimants might prosecute their claims.

But in all the legislation upon the subject, the claimants were never considered as possessing a legal title, until the final assent of Congress was expressed in some mode or other to that effect.[2]

*294] *The date of such legal title commences with the ratification by Congress, and does not extend back to the date of the imperfect title.

Therefore, the title of Cerré, being confirmed in 1836, must give way to patents for the same land, issued before that time, unless Congress had, by some law, protected the land from the location of patents.[3]

But the acts of Congress did not so protect it, because the concession of Cerré called for no boundaries, and had never been surveyed. Before land could be reserved from sale, it was necessary to know where the land was.[4]

The confirming act of 1836 declared that it should convey no title to any part of the land which had previously been surveyed and sold by the United States. This the United States had a right to do, because, having the plenary power of confirmation, they could annex such conditions to it as they chose.

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[1] APPLIED. *United States* v. *Hartnell's Ex'rs*, 22 How., 289.

[2] CITED. *Glenn et al.* v. *United States*, 13 How., 258.

[3] CITED. *Carondelet* v. *St. Louis*, 1 Black, 189; *Dent* v. *Emmeger*, 14 Wall., 313.

[4] FOLLOWED. *Ledoux et al.* v. *Black et al.*, 18 How., 475; *Hall* v. *Papin*, 24 Id., 144. CITED *Cousin* v. *Blanc's Exec.*, 19 Id., 210.

Where claims were confirmed according to the concession, a subsequent survey made in the mode pointed out by law is conclusive upon the United States and the confirmee, to show that the land included in the survey was the land the title to which was confirmed. But it does not follow that other persons, who may previously have purchased portions of the land from the United States, subsequent to the confirming act and before the survey, are equally concluded.[5]

The form of a Spanish title given.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Missouri.

It was one of those cases arising from a conflict between an old Spanish concession and a title otherwise acquired. The acts of Congress, passed from time to time to regulate these claims, are all set forth in the report of the case of *Stoddard* v. *Chambers*, 2 How., 317, and need not be repeated. It is only necessary now to state the respective titles of the plaintiffs and defendant, as exhibited by themselves.

This was an action of ejectment brought by Amédée Menard, a citizen of the state of Illinois, as assignee of Pascal L. Cerré, against the defendant, Samuel Massey, a citizen of the state of Missouri, for the recovery of a piece of land situated in the county of Crawford, and state of Missouri, containing three thousand and one acres and seventy-five hundredths of an acre, being survey number three thousand one hundred and twenty, of three thousand five hundred and twenty-eight arpens of land orginally granted to Pascal L. Cerré, in township thirty-eight north, of range five west, and townships thirty-seven and thirty-eight north, of range five west, of the fifth principal meridian. This tract of land was confirmed by the act of Congress of the 4th of July, 1836, to Pascal L. Cerré, the grantee, or his legal representatives, who conveyed to Amédée Menard, the plaintiff. Menard died during the pendency of the suit, and his heirs at law were made parties to the suit, all of whom were residents of the state of Illinois. A verdict and judgment were rendered against the plaintiffs in the Circuit Court, the case is brought to this court by the plaintiffs in error.

The case, on each side, as it appears in the transcript, is as follows:—

*On the 5th of November, 1799, one Pascal Leon Cerré presented his petition to Don Carlos Dehault Delassus, Lieutenant-Governor and Commander-in-Chief of Upper Louisiana, for seven thousand and fifty-six arpens of land, to be taken in two different places, as follows: the half of said [*295

[5] FOLLOWED. *Bryan et al.* v. *Forsyth*, 19 How., 336. CITED. *Guitard et al.* v. *Stoddard*, 16 Id., 512.

quantity, or three thousand five hundred and twenty-eight arpens, to be taken at the place commonly known by the name of the Great Source of the River Maramee; the other half on the head-waters of the Gasconade, and those of the Maramee, known by the name of La Bourbeuse.

On the 8th day of November, 1799, the Lieutenant-Governor, Charles Dehault Delassus, in pursuance of said petition, gave a concession for the quantity of land asked for by the petitioner, reciting that he was well convinced of the facts set forth and stated by the petitioner, and stated further in the grant, that, as it was situated in a desert where there was no settlement, and at a considerable distance from the town of St. Louis, he was not compelled to have it surveyed immediately, "*but as soon as some one settles on said place*," in which case he was required to have it surveyed without delay.

The said Pascal Leon Cerré, the grantee, produced a letter from Manuel Gayoso de Lemos, Governor-General at New Orleans, to Monsieur Gabriel Cerré, the father of the petitioner, dated New Orleans, 28th April, 1798, in which he acknowledged the many services which the said Gabriel Cerré had rendered the government, and his claim to the generosity of the same; and that the said Lieutenant-Governor, seeing the letter of the Governor-General Gayoso, inquired of said Gabriel Cerré in what manner he might reward him; and that said Cerré replied, that he was then advanced in years, and had a sufficiency of lands, and recommended his son, who was the head of a family, said Pascal Leon Cerré, who had then received no grant for any land, to the bounty of the government.

The concession was registered, by order of the Lieutenant-Governor, in the Book of Concession, and presented to the first Board of Commissioners for confirmation, by the grantee, September 15th, 1806; who reported against its confirmation, September 28th, 1810; and the claim was again presented for confirmation, 5th October, 1832, supported by documentary and oral testimony, and was unanimously recommended for confirmation by the Board of Commissioners, October 31st, 1833, and was confirmed by the act of Congress of the 4th of July, 1836, to the said Pascal L. Cerré, or his legal representatives.

*296] The land as confirmed was surveyed under the authority of *the United States, by Deputy-Surveyor Joseph C. Brown, from the 18th to the 20th of June, 1838, under instructions from the surveyor of the public lands in the states of Illinois and Missouri, dated the 6th of June, 1838.

On the 26th of February, 1844, by deed of that date, Pascal

L. Cerré conveyed said lands, as granted, located, and surveyed, to Amédée Menard, under whom the present plaintiffs claim as heirs at law.

By the act of Congress of the 4th of July, 1836, the above decision of the Board of Commissioners, under the acts of 1832 and 1833, was affirmed, and thereby, the title under said grant was confirmed.

The defendant admitted that he was, before and at the time of the commencement of this suit, in possession of the whole of section one, township thirty-seven north, range six west, except the west half of the southwest quarter of said section, containing eighty acres, which were the same premises on which "the Big Spring," at the source of the Maramee, is located.

The heirs at law of Amédée Menard, deceased, were admitted, from a statement made by Judge Pope, to be the present plaintiffs.

The plaintiffs gave in evidence a letter from the Secretary of the Treasury of the United States to the Commissioner of the General Land Office, dated 10th June, 1818, in which he was directed and instructed to furnish the receiver and register of the land office at St. Louis, Missouri, with a descriptive list of the land claims which had been presented and registered under the different acts of Congress for confirming the rights of individuals to lands that had not been confirmed, situated within said land district, with instructions to withhold from sale all such lands, until otherwise directed.

The land confirmed to Pascal L. Cerré, and now sued for, was then within the district of St. Louis. The letter of the Secretary of the Treasury was the official copy, transmitted by the Commissioner of the General Land Office to the register at St. Louis, and was produced by the said register, in whose possession the same was.

The plaintiffs gave in evidence, also, a list of claims which had been made out by Frederic Bates, former recorder of land titles at St. Louis, and which had been presented for confirmation, but not finally acted on by Congress; which list was also produced by the register of the land office at St. Louis, and taken from the files in his office, and on said list was this claim, since confirmed to Pascal L. Cerré.

Accompanying said list was a certificate made out by [*297
Frederic *Bates, former recorder of land titles at St. Louis, under date of 10th July, 1818, in which he states,—"The foregoing is a list of claims regularly entered in this office," and which were supposed to be situated and intended to be located within the county of St. Louis, and which was

no doubt made out, in pursuance of the instructions and directions from the Commissioner of the General Land Office, under the direction of the Secretary of the Treasury, reserving said lands from sale.

The plaintiffs also gave in evidence a proclamation of the President of the United States, dated June, 1823, and published in the summer and autumn of 1823, for the sale of public lands, on the third Monday of November in that year, at St. Louis, which were situate in the township and range in which the lands sued for in this action are located, and in which the lands sued for, and contained in the list made out by the recorder of land titles, as above stated, are reserved from sale.

The property in dispute was admitted by the defendant to be worth more than two thousand dollars.

The plaintiffs also proved, by the testimony of Augustus H. Evans, that this claim was located at "the Big Spring" on the Maramee. And, by the testimony of Henry A. Massey, that, between the years 1826 and 1828, Samuel Massey, in speaking of the works at "the Big Spring" on the Maramee, said there was an old claim on the land, which he understood had not been allowed, and authorized Major Biddle at that time to try and buy up that old claim.

The plaintiffs also established, by the testimony of Joseph C. Brown, the United States deputy surveyor, that he made the survey of this claim, at "the Big Spring," "as the source of the claim."

There was offered in evidence, on the part of the plaintiffs, Plat No. 2 from the register's office, and a copy of the original diagram, as certified by F. R. Conway, surveyor of the public lands in the states of Illinois and Missouri, dated Surveyor's Office, St. Louis, 11th April, 1846; which were objected to on the part of the defendant, and the objection sustained by the court; to which decision of the court plaintiffs' counsel excepted.

The above facts, and also a certified survey, under the act of 1836, constitute the title of the plaintiffs in error.

The evidence on the part of the plaintiffs was here closed.

The defendant, as it appears from the transcript, gave in evidence seven patents from the President of the United States, all issued on the 20th of December, 1826, to Samuel Massey and Thomas James, five for eighty acres of land each, *298] and one for eighty-two and ninety-six one hundreths acres, and one *other for eighty-one and twelve one hundreths acres of land; and all of said patents covering a part of the same land included in the survey of Pascal L.

Cerré, under the confirmation made to him at the great source of the Maramee.

The evidence on both sides being closed, the counsel for the defendant then prayed the court to direct the jury,—

1. That the plaintiffs in this case cannot recover against the defendant for any land embraced within the patents given in evidence by the defendant.

2. That the plaintiffs cannot recover in this case against the defendant, on account of any land within the plaintiffs' survey, without proof that the defendant, at the commencement of this suit, was in possession thereof; and the fact that the defendant had cut wood upon such land is not sufficient to authorize a recovery for the land upon which the wood was cut, if these were merely temporary trespasses and occupation of the land.

These instructions the court gave to the jury; whereupon the counsel for the plaintiffs excepted, and upon this exception the case came up to this court.

It was argued by *Mr. Lawrence* and *Mr. Badger*, for the plaintiffs in error, and *Mr. Ewing*, for the defendant.

The points made by the counsel for the plaintiffs in error were the following:—

That the decision made by the Supreme Court of the United States in the case of *Stoddard's Heirs* v. *Harry W. Chambers*, 2 How., 284, which is the same in principle as the case now before the court, must govern and settle this case.

That the claim of Pascal L. Cerré was duly filed with the recorder of land titles, September 15, 1806; and was amongst the first presented to the Board of Commissioners, in accordance with and pursuant to the acts of Congress of 2d March, 1805, and of 21st April, 1806.

The grant was made by Don Carlos Dehault Delassus, who was clothed with ample power for that purpose, as decided in *Chouteau's Heirs* v. *The United States*, 9 Pet., 137, and seems to have been prompted by the Governor-General Gayoso himself, from the interest which he took, and the obligations of the government to the father of the grantee for his many valuable services.

The grant called for a special location, but was not required to be surveyed, because of its being remote from the settlements, in the very terms of the concession, and was protected by treaty. It is true, the act of Congress of 2d March, 1805, ch. 86, required all grantees from the Spanish government to file plats, *orders of survey, &c. But there [*299

was no survey made prior to the confirmation, for, besides not being required by the terms of the grant, in this particular case there was no public officer to do it.

The claim is confirmed, according to the concession, and why it was rejected by the first Board of Commissioners, 28th September, 1810, it is difficult to conceive. The claim had been regularly continued before the commissioners, from the time it was first presented, 15th September, 1806, till it was rejected, 28th September, 1810.

Congress still continued to pass laws to protect the claims which had been thus presented for confirmation. Accordingly, the act of the 15th of February, 1811, provides, "that, till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land titles in the District of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the Territory of Louisiana." 2 Stat. at L., 621.

The same provisions were extended and continued in force; see 2 Stat. at L., 665, and act of 17th February, 1818 (3 Id., 407); and these claims were again protected by the several acts of Congress of 1826 and 1828, until this claim was finally unanimously recommended for confirmation by the Board of Commissioners acting under the act of Congress of July 9th, 1832, (4 Stat. at L., 565,) providing for the final adjustment of private land claims in Missouri, and, in pursuance of that recommendation, confirmed by the act of July 4th, 1836.

The plaintiffs, therefore, most respectfully contend that the instructions asked for on behalf of the defendant, and given by the Circuit Court of the United States on the trial of this cause, were clearly erroneous. That the patents to Massey and James issued on the 20th December, 1826, could confer no title; for they issued for land reserved from sale, or location, and were therefore void. *Wilcox* v. *Jackson*, 13 Pet., 498.

And to bring a case within the second section of the act of 1836, so as to avoid a confirmation, the opposing location must be shown to have been "under a law of the United States." *Stoddard et al. v. Chambers*, 2 How., 317. The sale made, and the issuing these patents to Massey and James, were not made "under a law of the United States." They were not only not authorized by law, but were expressly forbidden, and therefore no rights were acquired under these patents.

*300] *The counsel for the plaintiffs in error submit, with great respect to the court, that this case is precisely in

principle the same as the case of *Stoddard's Heirs* v. *Chambers;* and that the decision made in that case by this court will govern in this. That in the one case the owner of land in New Madrid, injured by earthquakes, made a relinquishment of such land to the United States, and, under an act of Congress, received a New Madrid certificate, under which a location was made, and a patent issued in the name of Eustache Peltier, on land covered by a Spanish grant made to Mordecai Bell; and in the other, Massey and James entered in the land office certain lands, and obtained from the government of the United States patents therefor, which lands were covered by a concession previously made to Pascal L. Cerré by the Spanish government; the lands in both cases being expressly reserved from sale.

And in conclusion they state, that,—

1. The plaintiffs in error claim under a confirmation of a grant, protected by treaty, and by the act of Congress.

2. That the decision of the Circuit Court of the United States is erroneous, and ought to be reversed, as being against a title guaranteed by treaty, and protected by legislative enactment. Treaty of 1803 (8 Stat. at L., 202).

Mr. Ewing, for defendant in error.

The claim of the plaintiffs to the land in controversy was submitted under the acts of Congress of July 9th, 1832, and March 2d, 1833, to the recorder and commissioners, and was recommended for confirmation; and it was confirmed by the act of July 4th, 1836, with this saving:—

"Sec. 2. And be it further enacted, That if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof, had been previously located by any person or persons under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title to such lands, in opposition to the rights acquired by such location or purchase; but the individual or individuals whose claims are hereby confirmed shall be permitted to locate so much thereof as interferes with such location or purchase on any unappropriated land of the United States," &c.

A part of the land claimed under this concession had been previously surveyed and sold by the United States, and patented to the defendant and Thomas James.

The court instructed the jury that the plaintiff could not recover for any land embraced in the said patents.

1st. The first question is as to the legality of this instruction. *The act of 1836 is the grant under which the plaintiffs claim title. It may be right or wrong, just [*301

or unjust, but the plaintiffs must take it as it is, and it must be construed altogether, which being done, it amounts to this. The United States confirm to the heirs of Amédée Menard all the lands contained in their concession, except so much thereof as has been surveyed and sold, and for that give to them an equal quantity of land elsewhere, to be selected by themselves.

This is the conveyance under which alone the plaintiffs can claim title. They may accept of it or not, as they please, but they cannot make it any thing that it is not.

Out of the statute, if they choose to go out of it for a title, they have nothing on which ejectment can be sustained,—they have no title.

It matters not how strong or how weak may be their right to claim a grant of the very land from the United States. They have got no such grant, and without it they can maintain no action. They are left to their humble petition and remonstrance.

2d. The question arising under the second assignment of error is, whether the action of ejectment can be maintained against a defendant who was not in possession when the suit was brought, and who is not shown to have claimed title, upon evidence that he had at some former period committed trespass upon the land.

It would be difficult to maintain the affirmative of the proposition. Ejectment is a possessory action. Its object is to recover the possession of the property claimed; and, according to the practice in England, the declaration must be served on the defendant, or some one representing him, upon the premises, unless he had left them immediately before to evade service.

It would be confusing the forms of action to allow a recovery in ejectment for a mere trespass, committed at a former period, and unaccompanied with possession, and would involve the absurdity of permitting an individual to maintain an action of ejectment for land of which he was himself in possession at the commencement of his suit.

Mr. Justice CATRON delivered the opinion of the court.

On the 5th of November, 1799, Pascal L. Cerré petitioned the Lieutenant-Governor of Upper Louisiana for a concession of land, in two parcels, in full property, one half of which, or thirty-five hundred and twenty-eight arpens, to be taken at a place known by the name of the Great Source of the River Maramee, at about three hundred miles from its mouth; *the other half, or thirty-five hundred and

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twenty-eight arpens, at some distance from the first, at the upper part of the headwaters of the Gasconade, and of those of the fork of the Maramee, known by the name of La Bourbeuse, or Muddy. To gratify this petition, the Lieutenant-Governor made the following concession:—

"*St Louis of Illinois, November* 8, 1799.

"Whereas the petitioner is one of the most ancient inhabitants of this country, whose known conduct and personal qualities are recommendable, and being convinced of the truth of what he exposes in his petition, I do grant the petitioner the land which he solicits; and as it is situated in a desert where there is no settlement, and at a considerable distance from this town, he is not compelled to have it surveyed immediately, but as soon as some one settles on said place, in which case he must have it surveyed without delay; and Don Antonio Soulard, Surveyor-General of this Upper Louisiana, will take cognizance of this title for his own intelligence and government in the part which concerns him, so as to enable the interested, after the survey is executed, to solicit the title in due form from the Intendant-General of these provinces of Louisiana.

"CARLOS DEHAULT DELASSUS."

"Registered by order of the Lieutenant-Governor, pages 15 and 16 of Book No. I., Titles of Concessions.—SOULARD."

This claim was laid before the first board in the following form:—

"*September* 15, 1806. Pascal L. Cerré, claiming a tract of a league square, to be surveyed in two parts or halves, the one on the Big Spring of the River Maramee, so as to include said spring, and the other at the fall of the forks of the Gasconade and those of the Maramee, called the Muddy, produces a concession from Charles Dehault Delassus, dated 8th November, 1779."

That board (September 28, 1810) were of opinion, that the claim ought not to be confirmed; and so reported to Congress. And thus the claim stood until October 31, 1833, when it was presented to the second board, created by the act of 1832; and this board was of opinion, and reported to Congress, "that the claim ought to be confirmed to Pascal L. Cerré, or his legal representatives, according to the concession." And by the act of July 4, 1836, Congress confirmed the claim according to the report, and consequently according to the unsurveyed concession.

*The township, including "the Big Spring of the River Maramee," was offered for sale on the third Monday of November, 1823, pursuant to the proclamation of the President. Whether Massey and James purchased at the public sale in 1823, or entered afterwards, does not appear from the record; but in 1826 and 1827 they obtained their different patents for the land in dispute, from the United States; and these titles, the court below charged the jury, were superior to Cerré's confirmed claim. And here the question arises, whether Cerré's concession, on being confirmed by Congress in 1836, related back to its date of 1799, and overreached the United States title made to Massey and James. If it does so relate to the extent of the survey made under the confirmation in 1838, and approved in 1840, then the controversy is at an end; and as on this assumption the suit was brought, it becomes necessary to examine the question of relation of title. The argument is, that the concession was made by an officer who had power to grant; and having done so, the land granted was "property," and protected by the third article of the treaty of 1803, which declares that the inhabitants of the ceded territory shall be maintained and protected in the free enjoyment of their liberty and property; and that the laws of nations, equally with the stipulations of the treaty, secured the title of such grantees.

That the Lieutenant-Governor of Upper Louisiana had the authority, as a sub-delegate, under the Intendant-General of the provinces of Upper and Lower Louisiana and Florida, to make concessions, is undeniable; he could and did deal with the public domain of the province,—made concessions, directed the lands to be surveyed, and caused grantees to be put into possession. This, however, does not settle the question. It does not depend upon the existence of power, or want of power, in the Lieutenant-Governor, but on the force and effect of the right his concession conferred. Did it give such a vested title in the soil, as that the Spanish government could not legally disavow it? Or could the Intendant-General, representing the royal authority, lawfully refuse to confirm the concession, and order the grantee to be turned out of possession? If it be true, that the title ended with the concession, survey, and occupancy of the land granted, then it follows, that the title was completed and perfected under the Spanish laws, by these acts; nor was a confirmation from any higher power than the Lieutenant-Governor at all necessary; the grantee having all the title that the king could give. The assumption, that such was the Lieutenant-Governor's power, and the force and effect of the title, sets out with the asser-

tion, that neither the regulations *of Morales, nor any previous regulations of the Spanish governors, were ever in force in Upper Louisiana, and that the act of the Lieutenant-Governor was conclusive as to law and fact when making grants; that he could grant to any one, for any quantity, and for any reason, or without reasons, and on any condition, or without conditions; and that no authority existed to supervise his acts; and we are referred to various expressions and conjectures on this subject. In the cases of Soulard and Smith T., against the United States, (4 Pet.,) this court, after holding the cases under advisement for a year, professed itself unable, from want of information, to give any opinion in the matter; and, for this reason, the cases were not then decided. This occurred in 1830. In 1835 and 1836, in the cases of *Clarke, Delassus*, and two of *Chouteau's Heirs*, found in 8 and 9 Pet., regulations for the government of sub-delegates are admitted to have existed, but not to such an extent as to control the Lieutenant-Governors in regard to person, quantity, or reason, when making concessions and orders of survey; and such has been the doctrine of this court since that time, so far as concessions made in Upper Louisiana have been adjudged. These cases address themselves to a single consideration; that is to say, whether the Lieutenant-Governor's powers were so limited that the concessions then before the court were void for want of power; but they do not settle the question, that the grant was a perfect title. It is said by the court in the case of *Chouteau's Heirs*, 9 Pet., 154,—"It is remarkable, that, if we may trust the best information we have on the subject, neither the Governor nor the Intendant-General has ever refused to perfect an incomplete title granted by a deputy-governor or sub-delegate." In point of fact, this is certainly true. No such refusals could take place. From the parts of Upper Louisiana, where grants were made, to New Orleans, where the Intendant-General and Governor-in-chief resided and kept their offices, the distances were so great, and the trackless wilderness between so infested with hostile Indian tribes, that few could apply, had they possessed the means to pay for perfecting their titles. And, in the next place, the principal standard of value was skins in the upper province; specie was hardly known there. And, then, again, land was of no material value to such a population, who resided in villages, and cultivated patches within a common fence, where each inhabitant had his portion assigned by a syndic. But two instances are known to exist in Upper Louisiana, where the Intendant was applied to for a complete title, and made the same; one case was that of Moses Austin for a league square

at Mine á Breton, a report on *which is found in 2 American State Papers, 678, and the other perfected title was made to Mr. Reigh, in the neighborhood of St. Louis.

The fact, therefore, that the intendant-generals and governors did not refuse to make perfect titles, is no evidence that they had not the power to deal absolutely with concessions made by sub-delegates, and to give titles or refuse them, as the Congress of the United States has done. Like Congress, they exercised the sovereign power. The concession before us addresses itself to the Intendant-General and refers the grantee to him, "to solicit the title in due form," as do, uniformly, all the concessions and orders of survey made by lieutenant-governors, after the Intendant was restored to power. By the eighty-first article of the royal ordinance providing for Intendants of New Spain, (2 White's Recop., 69, 71,) such Intendants were made the peculiar judges of causes and questions arising in their respective districts, relating to the sale, distribution, and grant of royal lands; and, a dispute having arisen in 1797, between Morales, Intendant *ad interim*, and Don G. de Lemos, Governor of Louisiana, respecting the exclusive right claimed by the former to control such grants, (see Id., 469, *et seq.*,) the royal order of 22d October, 1798, was issued, reaffirming this eighty-first article, and declaring the powers of the Intendant to be plenary, and in conclusion of all other authority, to divide and grant all kinds of lands belonging to the crown. (Id., 245, 477.) Acting under and by virtue of these two royal orders, the Intendant, Morales, on the 17th of July, 1799, published his regulations, addressed to the lieutenant-governors, sub-delegates, and to the people of the provinces of Lower and Upper Louisiana, and West Florida, so that those who wished to obtain lands might know in what manner to ask for them, and on what conditions they could be granted and sold:—"And especially," in his own language, "that those who are in possession without the necessary titles may know the steps they ought to take to come to an adjustment; that the commandants and sub-delegates of the intendancy may be informed of what they ought to observe. He then states, that a great number of those who have asked for land think themselves the legal owners of it; those who have obtained the first degree, by which a surveyor is ordered to measure and put them in possession; others, after a survey has been made, have neglected to ask for "a title to the property;" and as like abuses, continuing for a longer time, will augment the confusion and disorder which will necessarily result, "we declare, that no one of those who have obtained said decrees, notwithstanding in virtue of

*them the survey has taken place, and that they have been put in possession, can be regarded as owners of the land, until their real titles are delivered completed, with all the formalities before recited." The foregoing is an extract from the eighteenth article of the regulations of July, 1799, which regulations had the force of written law up to the time when a change of government took place. The formalities for completing a real title are prescribed by the three articles preceding the eighteenth; the surveyor was bound to forward to the Intendant a survey, and also a copy of the survey, or rather a figurative plot, and a certificate called a proces-verbal, signed by the commandant, or a syndic and two neighbors, together with the surveyor, declaring that the survey was made in their presence, and corresponded with the facts stated in the proces-verbal, and on the concession, this figurative plot, and the proces-verbal, the complete title was founded; a copy of the plot and proces-verbal being attached; and which evidence of title was recorded in several departments. Such, in substance, was the real title completed. The necessity of a further title than a mere loose order of survey, given by commandants of posts and lieutenant-governors, and placed in the hands of the interested party, is too manifest for comment. Petitions were written by the party asking the land, or some one for him; the governor consented, usually by indorsement on the petition, and ordered that the petitioner should have the land, and directed that it should be surveyed; the paper was handed to the petitioner, who might deliver it to the surveyor, or omit it; if he presented it, and the land was laid off, then it was the surveyor's duty to record both the concession and plat, together with the proces-verbal. But this did not make the party owner; without the further act of the king's deputy,—the Intendant-General,—the title still continued in the crown.

As assumed in argument, (and truly,) by the third article of the treaty by which Louisiana was acquired, and by the laws of nations, the inhabitants of the ceded territory were entitled to be maintained and protected in the free enjoyment of their property. But in what property? To such an interest in it, if land, as they had when the country changed owners; and that interest being of a character requiring royal sanction before the Spanish government would recognize it as divesting the public title, our government, as the successor of Spain to the public lands, gave the same construction and effect to concessions and orders of survey; holding, that the title of the king's domain passed by treaty to the United

States, notwithstanding the existence of such concessions. *307] Yet, to the full extent of any equity *in the claimants, the government adopted means to satisfy the claims; and, as the sovereign power could not be sued as legal owner, Boards of Commissioners were created, with liberal powers, to investigate every description of claims, and report on them to Congress, for the sanction of sovereign authority; and by this means many claims were confirmed, the legal title added, and incipient concessions completed into perfect and conclusive titles against the government. Then, again, Congress provided that special courts should be organized, in which the government might be sued, in a prescribed form, and decrees be made for or against claimants; but no suit could be maintained in an ordinary action of ejectment, or for title of any kind, on a concession and an order of survey, for want of legal title to sustain it. Such claimants "were not regarded as owners of land, until the real title was delivered completed," in the language of the Spanish regulation No. 18. Had the courts of justice been allowed to hold otherwise, and to interfere in the matter, and to decree titles to claimants in equity, or to enforce their claims at law, and oust the United States indirectly by suing persons found on the land, little or no occasion would have existed for boards, or special courts, to adjudge respecting the validity of claims; as the ordinary tribunals could have settled all controversies under state laws declaring such claims cognizable in the state courts. It was therefore manifest, that claims resting on the first incipient steps must depend for their sanction and completion upon the sovereign power; and to this course claimants had no just cause to object, as their condition was the same under the Spanish government. No standing, therefore, in an ordinary judicial tribunal has ever been allowed to these claims, until Congress has confirmed them and vested the legal title in the claimant. Such, undoubtedly, is the doctrine assumed by our legislation. To go no further, the act of May 26th, 1824, allowing claimants a right to present their claims in a court of justice, pronounces on their true character. It declares, that the claim presented for adjudication must be such a one as might have been perfected into a complete title under and in conformity to the laws, usages, and customs of the government under which the same originated, had the sovereignty of the country not been transferred to the United States; and, by the sixth section, when a decree is had favorable to the claim, a survey of the land shall be ordered, and a patent shall issue therefor; and by section eleventh, "if the decree

shall be in the claimant's favor, and the land has been sold by the United States, or otherwise disposed of, the interested party shall be allowed to enter an equal quantity of land elsewhere." So, again, the act *of July 9th, 1832, [*308 creating the last board, directs the commissioners to inquire into and examine all unconfirmed claims previously filed, founded on any incomplete grant, concession, warrant, or order of survey, issued by the authority of France or Spain, and to class the same so as to show, first, what claims, in their opinion, would in fact have been confirmed according to the laws, usages, and customs of the Spanish government and the practice of the Spanish authorities under them "at New Orleans," if the government under which said claims originated had continued in Missouri; and, secondly, what claims, in their opinion, are destitute of merit under such laws, usages, and customs. And by section third it is declared, that from and after the final report of the commissioners, the lands of the second class shall be subject to sale, the same as other public lands; and that those of the first class shall continue to be reserved from sale, as heretofore. From the first act, passed in 1805, up to the present time, Congress has never allowed to these claims any standing other than that of mere orders of survey and promises to give title; and which promises addressed themselves to the sovereign power in its political and legislative capacity, and which must act, before the courts of justice could interfere and protect the claim. And so this court has uniformly held. The title of Cerré having no standing in court before it was confirmed, it must of necessity take date from the confirmation, and cannot relate back so as to overreach the patents made in 1826 and 1827.

The next ground relied on to reverse the decision of the Circuit Court is, that Cerré's claim was reserved from entry and grant by the act of March 3d, 1811, providing for the sale of public lands and the final adjustment of land claims. The fifth section declares that back lands to front grants on the Mississippi River, &c., are reserved from sale; and by section sixth it is provided, that, until after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been, in due time, and according to law, presented to the register of the land office for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Orleans. The eighth section declares, that the Surveyor-General shall cause such lands in the Louisiana territory as the President shall direct to be surveyed, like other public lands; offices are established for their disposal,

and it is directed that they shall be sold by order of the President. But from this power to sell are excepted section number sixteen, salt springs, and lead mines, with such lands
*309] adjoining thereto as the President shall direct; and *then comes the exception relied on for the protection of Cerré's claim, to wit,—"That, till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been, in due time, and according to law, presented to the recorder of land titles in the District of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana." (See Land Laws, 194.)

That this provision is an exception to the general powers conferred on the officers to sell, is not an open question; having been so adjudged by this court in the case of *Stoddard's Heirs* v. *Chambers*, reported in 2 Howard; and again at the present term, in the case of *Bissell* v. *Penrose*, *post*, p. *317. Nor is it an open question, that the act of February 17, 1818, § 3, re-enacts and continues in force the exception as respects such lands. This was also decided by the above cases; and that such was the opinion of Congress is manifest from the third section of the act of July 9, 1832, under which the last board acted; for it declares, that lands of the first class shall be reserved from sale "as heretofore."[1]

All these acts of Congress, with their exceptions, address themselves especially to the Department of Public Lands, as by them that department must be guided. In reserving lands from sale, it was necessary to know where they were situated, and how far they interfered with the public surveys. Either the President, or some other officer, must have had the power to designate the lands as those adjoining to salt springs and lead mines; or it must have appeared in some public office appertaining to the Land Department what the boundaries of reserved lands were; and if it did not appear, no notice of the claim could be taken by the surveyors, nor by the registers and receivers when making sales. This was a conclusion that has from necessity been acted on at the land offices; and as Cerré's claim was not surveyed before the confirmation took place, no boundaries of his tract could be recognized when the public surveys were made and the lands sold. He claimed no "tract of land." The laws refer to specific tracts that are claimed; it is not material whether the boundaries are proper, and according to the concession, or the claim be

[1] CITED. *Willot et al.* v. *Sandford*, 19 How., 82.

just or otherwise, so that the tract claimed be certain. This was also decided in the cases just cited. Certainly, a mere floating claim, founded on a concession that was ordered to be located by survey, and where no survey or location had been made, was not protected by the act of 1811. An actual survey is not indispensable; but boundaries must appear, in some form, from the notice of claim and *the accompanying evidences filed with the recorder. [*310 If, from these, the tracts could not be laid down on the township surveys, then the land could not be reserved from sale; although, by the concession, and by the notice, a particular spot, (as the Big Spring of the Maramee,) was referred to in general terms as the place where the land should lie.

But there is another ground of defence, that would have been conclusive, even had Cerré's claim been surveyed and the survey filed with the recorder in 1806, accompanying the notice of claim. By the second section of the confirming act of July 4th, 1836, it is provided, that, "if it shall be found that any tract confirmed by this act, or any part thereof, had been surveyed and sold by the United States, this act shall confer no title to such lands, in opposition to the rights acquired by such location or purchase; and the party whose claim is confirmed by this act shall be authorized to enter a quantity of land equal to the interference elsewhere."

Having seen that the United States might confirm the claim of Cerré, or might refuse to do so; and that it took date as a title recognized in the judicial tribunals from the confirming act, it follows that the claim might be confirmed in such part, and on such conditions, as Congress saw proper to prescribe; and having refused to confirm it for lands lying within its boundaries which had been previously sold, and the patents to Massey and James being of this description, they are the only legal title to the land; and, therefore, the charge of the Circuit Court was proper.

The survey of Cerré's tract, founded on the confirmation, was given in evidence, and recognized as part of his title by the Circuit Court; which circumstance we deem it proper not to pass without notice. By the act of April 26th, 1816, it was provided that a surveyor should be appointed of the public lands for the territories of Illinois and Missouri, whose duty it should be to cause so much of the lands in said territories as the President should direct, to be surveyed and divided as were the public lands lying northwest of the river Ohio; and the act declares that "it shall also be the duty of the surveyor to cause to be surveyed the lands in said territories, the claims to which have been, or hereafter may be, confirmed by any act

of Congress, which have not already been surveyed according to law; and he shall transmit to the registers of the land offices in said territories general and particular plats of all the lands surveyed or to be surveyed, and shall also forward copies of said plats to the Commissioner of the General Land Office; and equally all the plats of surveys and all other papers and documents pertaining to or which did pertain to the office of Surveyor-General under the Spanish government within the limits of the territory of Missouri, &c. shall be delivered to the surveyor appointed under this act." And any plat of survey, duly certified by said surveyor, shall be admitted as evidence in any of the courts of the United States, or the territories thereof." Under this authority, Cerré's claim was surveyed; as will better appear by the following certificate, preceding the description of the lines:—

"Plat and description of the survey of a tract of 3.528 French arpens, equal to 3.001 and twenty-five hundredths English acres of land, situated in township thirty-eight north, range five west; and townships thirty-seven and thirty-eight north of the base line, range six west of the fifth principal meridian, in the state of Missouri; executed from the 18th to the 20th of June, 1838, by Joseph C. Brown, deputy surveyor, under instructions from the surveyor of the public lands in the states of Illinois and Missouri, dated the 6th of June, 1838; it being the one half of 7.056 arpens, or a league square, granted in two tracts of equal quantity, on the 8th of November, 1799, to Pascal L. Cerré, by Zenon Trudeau, Lieutenant-Governor of the Spanish province of Upper Louisiana; this tract 'to be taken at the place commonly known by the name of the Great Source of the River Maramee, at about three hundred miles from its mouth, so as to include the said sources;' and confirmed to Pascal L. Cerré by the act of Congress of the United States approved on the 4th of July, 1836, entitled, 'An act confirming claims to land in the state of Missouri, and for other purposes,' according to the decision No. 2 of the report of the Board of Commissioners appointed by the act of Congress, approved on the 9th of July, 1832, entitled, 'An act for the final adjustment of private land claims in Missouri,' and the act of Congress approved the 2d of March, 1833, supplemental thereto."

The Surveyor-General approved the survey, June 26, 1840. In having the land laid off, and in approving the survey, he acted under the authority of Congress, expressly conferred by the act of 1816. Joseph C. Brown testified that he made this survey, being the same offered in evidence above; that the survey was made at the time stated on its face, and was made

by the witness at the place known and called "the Big Spring of the Maramee;" that the said spring was on section one, as marked and designated on the plat before him. The Big Spring was a very large body of water breaking out of a high bluff, and made a stream from the spring itself of about one hundred feet wide, and a foot in depth; that witness made the survey by direction, and under the authority given to him by *the Surveyor-General of the United States at St. Louis. Witness further stated that the survey was made according to Mr. Cerré's directions, and in obedience to the instructions given to him by the Surveyor-General; Mr. Cerré made no particular reconnoissance of the ground, although personally present, but took the land as it came; and it was made by the surveyor at the particular place indicated, the Big Spring, as the source of his claim. Witness stated further, that the instructions from the Surveyor-General were printed instructions, of which a copy is set out. Among numerous and detailed instructions referred to by the witness, there are the following:— [*312

"Information given to you by a claimant or his agent relating to the situation of a claim will govern your operations, provided you believe, from all the circumstances which come to your knowledge, that such information is correct; and provided also that it does not contradict the papers with which you may be furnished. The position of any point or place called for in a concession, and also of the settlement or improvement in virtue of which a settlement claim is confirmed, must be stated in your field notes. The survey of claims which are confirmed unconditionally, *according to a former survey*, will conform thereto, regardless of any excess or deficiency in quantity, provided the old lines and corners can be found and properly identified; in which event, the old corners will be run to, and the true courses and lengths of the several lines, according to your operations, will be correctly stated in your field notes; and if the old lines and corners cannot all be found, you will conform to the old survey, as near as practicable, by running the courses and distances called for, or to the intersection of the proper lines, as may be required, making the necessary allowance for the difference in the variation of the needle.

"2. The resurveys of claims which are confirmed according to an old survey, but are restricted in quantity, will be surveyed as above directed for those not restricted, except that, if there is any excess or deficiency, it will be thrown off or taken in a line parallel to that old line of the survey, which the claimant may direct; or if he fails or declines to give

directions, throw off the excess or take in the deficient quantity on the side which you think will best promote his interest, being careful to note all the particulars relating thereto in your field book, and give the position of the old lines and corners which may be abandoned because of the excess or deficiency in quantity.

*318] "3. Claims which are confirmed according to the concession, *and have been legally surveyed in conformity therewith, except as to exactness in quantity, will be resurveyed as the class of cases last above mentioned.

"4. If the survey heretofore executed of a claim which is confirmed according to a concession, whether the concession is, or is not, special as to locality, but is special as to the direction of the lines, the proportional length of the different sides, or the figure of the survey to be made in virtue thereof, does not conform to these requirements of the concession, the said survey will be altogether disregarded, except so far as it may be useful, in cases where the concession is not special as to locality, in identifying the situation of the intended concession to be confirmed, unless the survey was executed and approved by the proper Spanish officer prior to the transfer of the country to the United States; in which event, the survey will be considered as evidence of the changed intention of the authority making the concession, and will be taken as a part and parcel thereof.

"5. Claims which are confirmed according to special concessions, and which have not been surveyed, you will survey in strict accordance with the terms of the concessions; always bearing in mind, that where there are no special requirements in the concession, it was the general practice of the government with which the claims originated to run them either in squares, or in right-angled parallelograms of one, five, ten, or some intermediate or greater number of arpens, by forty or eighty, according to the size of the tract, or double as long as wide, unless some other survey or grant intervened and rendered a departure from this rule unavoidable; in which case, the rule was only so far departed from as was necessary to get rid of the interference with prior surveys."

Cerré's claim was of the last class. The land was directed to be surveyed according to his directions; the surveyor having regard to the last (and fifth) instruction, with the exception, that the special spot called for in the concession was required to be laid down and noted in some part of the survey. When it was made, and the field notes returned to the Surveyor-General's office, and the description and plat made out in form and approved by the Surveyor-General, it was

conclusive evidence, as against the United States, that the land granted by the confirmation of Congress was the same described and bounded by the survey; unless an appeal was taken by either party, or an opposing claimant, to the Commissioner of the General Land Office. This consideration depends on the fact, that the claimant and the United States were parties to the *selection of the land; for, as they agreed to the survey, they are mutually bound and respectively estopped by it. But private claimants of lands within its boundaries, who were no parties to the survey, are not estopped, and may controvert its conclusiveness, so far as their claims interfere with the lands thus selected by the party, and which were laid off to him by the United States. We are not called upon to say, nor do we wish to be understood as intimating, to what retrospective date the confirmation by Congress of land thus surveyed relates, so as to overreach a claim by purchase from the United States, further than the case before us requires, which is, that lands purchased before the act of July 4th, 1836, was passed, are protected against the confirmation made by that act. [*314

For the reasons stated, we order the judgment of the Circuit Court to be affirmed.

For a more perfect understanding of the manner in which a complete title under the Spanish government was executed, the form of such a title, translated from the Spanish, is hereto annexed.[1]

Don Joan Ventura Morales, Principal Comptroller of the Armies, Intendant ad interim of the Royal Finances of the Provinces of Louisiana and West Florida, Superintendent, Sub-delegate, Judge of the Admiralty, of the Royal Lands and Domain, &c.:—

Whereas (D. M. D.) an officer of the militia, residing in this city, has appeared before this tribunal, petitioning the grant and title of one hundred and twenty-six arpens of land, with that front to the Bayou de los Lobos and the depth of forty, bounded by (Don F. S.) and vacant lands on the Bay St. Louis, provided they be of the royal domains, to establish there a plantation and cow-pens, stating that he has taken the proper steps and showing that he has made the necessary provisions for establishments of that kind; and having presented the plat of the royal surveyor (Don C. T.), indicative and figurative of the said one hundred and twenty-six arpens in front by forty in depth situated in the above-mentioned place;

[1] See *United States* v. *Philadelphia and New Orleans*, 12 How., 652

and having submitted the whole to the fiscal of the royal finances, and he having made no objection to the demand of the said (D. M. D.) but on the contrary, having given an opinion in his favor by an act with the advice of his assessor, dated the 29th instant: I have acceded the said grant, and I do order that the title be made. Accordingly, using the power given to this intendancy, in the name of the king our lord, (whom God protect,) I do grant to the above-said (D. M. D.) *the above-mentioned tract of land, containing one hundred and twenty-six arpens in front and forty in depth, situated at the place called the Bay St. Louis, fronting to the Bayou de los Loires and bounded by the lands of (Don V. S.) and vacant lands, in conformity to the points and distances marked on the plat and its certificate, in which is recited the measure appearing in the docket of said matter for record; out of good-will, and without any pecuniary consideration in favor of the royal financier, I give him the whole and direct ownership to the said granted land, for him and his successors in said lands, with power to him, the said grantee, to dispose of the same at his will; with power to take possession of the same, and claim it from this intendancy if there is any obstacle, and in said land forthwith I place and put him without any damage to the rights of third persons who may have a better right to it; with the qualification and condition that he, the said (D. M. D.), to whom we do this favor, and his successors, shall, as regards such tract of land, fulfil the obligations imposed upon him by the regulations and instructions made and published by this intendancy on the 17th of July, 1799, to wit, the third, fourth, sixth, seventh, and ninth of said instructions, conformably to the location, place, quality, and circumstances of the said granted land; whereof we advise him, that he may know it and not pretend to be ignorant of it, under the penalties contemplated in said instructions, with which he shall acquaint himself. In virtue of which I have ordered these presents to be drawn under my hand, and sealed with the seal of my arms, and countersigned by the undersigned notary of the royal finances; who, as well as the principal Comptroller's office, will register it.

*215]

Given at New Orleans, the 29th of May, 1802.

[L. S.] (Signed,) JUAN VENTURA MORALES.

By order of the Intendant.

(Signed,) CARLOS XIMENES.

Registered the foregoing title from page 41 to 48 of the book for that purpose. New Orleans, 29th May, 1802.

(Signed,) XIMENES

In the principal Comptroller's office the foregoing title has been registered in the book assigned for that purpose, at folio 10. New Orleans, 9th of June, 1802.

(Signed,) ARMIDEZ.

I, Don Carlos Trudeau, Surveyor Royal and Particular of the Province of Louisiana, &c., do certify, that in favor of, and in *presence of (D. M. D.) and with the assistance of the syndic, Don Philip Sancier, and the adjoining neighbor, has been verified, bounded, and limited, a tract of land of one hundred and twenty-six arpens in front to the Bayou de los Lobos, with the ordinary depth of forty arpens, measured with the *perche* of the city of Paris, of eighteen feet long, measure of the said city; which tract of land is situated at the place called the Bay of St. Louis, on the southern bank of the Bayou de los Lobos; joining on the north part the bank of said bayou; on the south, land granted to Don F. S.; and on the other sides, by vacant lands of the domain of his Majesty, by parallel lines running southeast by south. On each limit has been planted a stake made of pine, driven into the ground to a depth of two feet; the first implanted upon the bank of the bayou, and the other at the foot of the high land; at the extremity of the ordinary forty arpens, I have planted no boundary, the soil being covered with water and impracticable, as it appears on the plan on the other side, which exhibits the extent and direction of the limits, &c. This survey has been made pursuant to a decree of his Lordship the Intendant-General, dated the 15th of the month of March last past. In testimony whereof, I have delivered these presents, with the foregoing figurative plan, the 15th of the month of April, 1802. Signed, I the present surveyor, and registered in the Book C, No. 3, fol. 62, at No. 1514, of the operations of survey. [*316

I do certify that the present copy conforms to the original. Given to the interested party to enable him to proceed so as to obtain the corresponding title of grant in due form.

(Signed,) CARLOS TRUDEAU, *Surveyor Royal.*

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Missouri, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

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*LEWIS BISSELL, PLAINTIFF IN ERROR, v. MARY B. PENROSE, DEFENDANT.

In the case of *Stoddard* v. *Chambers*, 2 How., 284, this court decided by implication, and now decides expressly, that a general and unlocated concession, granted by the Spanish governor prior to the transfer of Louisiana, a private survey of which made after the transfer was recognized by the commissioners appointed under the act of 1805, before whom the claim was filed, was so designated and located as to be reserved from sale by virtue of the act of 1811, and consequently no New Madrid certificate could be located upon it.[1]

The act of 1804, forbidding private surveys upon the public lands, was impliedly repealed by the act of 1805, which required claimants to file a plat. The act of 1806 authorized the commissioners to direct such surveys as they might deem necessary, which gave them, thereby, the power to adopt any prior and private surveys which they might deem just and proper, for the purpose of designation and location.

The effect of such private surveys was not to sever the land from the public domain, but merely to indicate the tract which Congress was to act upon at a subsequent period, in case it thought proper to confirm the claim.[2]

The act of 1836 confirmed the claims of assignees who had prosecuted them as claimants, and did not intend to vest the title in the assignor, the original holder. This court has so decided in former cases.[3]

The confirmation by the act of 1836 is equally effectual in favor of the claimant, whether the commissioners recommended that the claim should be confirmed generally, or confirmed "according to the survey." The only difference is, that in the latter case the survey on file is probably conclusive upon the government, and errors cannot be corrected, whilst in the former case they may be.

The second section of the act of 1836 makes no provision for a re-location of an unlocated claim confirmed on the report of the commissioners, and further legislation will be necessary for such cases.

The cases of *Mackay* v. *Dillon*, 4 How., 421, *Les Bois* v. *Bramell*, 4 Id., 449, and *Jourdan* v. *Barrett*, 4 Id., 169, examined and explained.

The mere circumstance that another plat, containing different land, was upon the same sheet of paper which contained the genuine plat, and which was filed in the recorder's office, was not sufficient to invalidate the claim; because the name of the claimant was written upon the face of the one describing the tract claimed, and that was the only one before the commissioners.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Missouri.

It was one of those land cases which arose from a conflict of title between an old Spanish concession, confirmed under the various acts of Congress upon the subject, and a title derived under a New Madrid grant. All these acts of Congress bearing upon both titles are set forth in the case of

[1] APPLIED. *Landes* v. *Brant*, 10 How., 374. FOLLOWED. *Menard's heirs* v. *Massey*, *ante* *309; *Bryan* v. *Forsyth*, 19 How., 337. EXPLAINED. *Carondelet* v. *St. Louis*, 1 Black, 189. CITED. *Morehouse* v. *Phelps*, 21 How., 305; *Massey et al.* v. *Papin*, 24 Id., 364; *Maguire* v. *Tyler*, 8 Wall., 661; *Tyler* v. *Maguire*, 17 Id., 280; *Carpenter* v. *Rannels*, 19 Id., 146; *Snyder* v. *Sickels*, 8 Otto, 212.

[2] See *Fremont* v. *United States*, 17 How., 576.

[3] APPROVED. *Stanford* v. *Taylor*, 18 How., 412. FOLLOWED. *Connoyer* v. *Schaeffer*, 22 Wall., 261–263.

Stoddard v. *Chambers*, reported in 2 How., 284, and the substance of them need not be repeated here. The following is a list of them:—

References to Acts of Congress.

Date.	Land Laws, Sen. Ed., 1838.	U. S. Stat. at L.	Story's Ed. L. U. S.
March 26th, 1804,	Vol. 1, page 112	Vol. 2, page 287	Vol. 2, page 983
March 2d, 1805,	" 1, " 122	" 2, " 324	" 2, " 966
February 28th, 1806,	" 1, " 132	" 2, " 382	" 2, " 986
April 21st, 1806,	" 1, " 138	" 2, " 391	" 2, " 1018
March 3d, 1807,	" 1, " 155	" 2, " 440	" 2, " 1059
March 3d, 1811,	" 1, " 189	" 2, " 620	" 2, " 1193
June 13th, 1812,	" 1, " 216	" 2, " 748	" 2, " 1257
March 3d, 1813,	" 1, " 230	" 2, " 812	" 2, " 1306
August 2d, 1813,	" 1, " 233	" 3, " 86	" 2, " 1384
April 12th, 1814,	" 1, " 242	" 3, " 121	" 2, " 1410
February 17th, 1815,	" 1, " 255	" 3, " 211	" 2, " 1500
April 29th, 1816,	" 1, " 280	" 3, " 328	" 3, " 1604
February 17th, 1818,	" 1, " 293	" 3, " 406	" 3, " 1659
April 9th, 1818,	" 1, " 299	" 3, " 417	" —, " ——
April 26th, 1822,	" 1, " 344	" 3, " 668	" 3, " 1841
May 26th, 1824,	" 1, " 385	" 4, " 52	" 3, " 1959
May 22d, 1826,	" 1, " 419	" —, " ——	" —, " ——
March 2d, 1827,	" 1, " 425	" 4, " 219	" 3, " 2048
May 24th, 1828,	" 1, " 442	" 4, " 298	" 4, " 2135
March 2d, 1831,	" 1, " 488	" 4, " 482	" 4, " 2250
July 9th, 1832,	" 1, " 505	" 4, " 565	" 4, " 2305
March 2d, 1833,	" 1, " 518	" 4, " 661	" 4, " 2359
July 4th, 1836,	" 1, " 557	" 4, " 736	" 4, " 2815

[*318 *It was an action of ejectment brought in the Circuit Court by Mary B. Penrose, the defendant in error, who claimed under the Spanish concession, against Bissell, who claimed under the New Madrid certificate which was located upon the land in controversy in March, 1818. We will first state the title of the plaintiff below, and then that of the defendant.

The petition and concession were as follows, viz.:—

"*The sons of Vasquez, claiming* 800 *arpens each.*

"To Don Carlos Dehault Delassus, Lieutenant-Governor of Upper Louisiana.

"SIR,—Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, all of them sons of Don Benito Vasquez, captain of militia of this town, brevetted by his Catholic Majesty, full of confidence in the generosity and benevolence of the government under which they are born, hope that you will be pleased to take into consideration the unfortunate situation in which they find themselves by the want of means of their family, which has been living for some time in distressing circum

stances, and unable to give them the necessary education; therefore, wishing to procure to themselves, in the course of time, an independent existence, they think of forming an establishment which may one day insure their welfare. They flatter themselves, sir, that the services of their father will assure to them your protection, and the goodness of your heart will lead you to grant their demand; consequently, they supplicate you to grant to each of them eight hundred arpens of land, in superficie, making altogether the quantity of four thousand arpens, which they wish to take in one or several places of the vacant lands of the king's domain. Favor which your petitioners presume to hope from your justice.

"BENITO VASQUEZ,
ANTOINE VASQUEZ,
HYPOLITE VASQUEZ,
JOSEPH VASQUEZ,
PIERRE VASQUEZ.

"*St. Louis, February 16th*, 1800."

"*St. Louis of Illinois, February 17th*, 1800.

"After seeing the precedent statement, and the laudable motives which animate the petitioners, and considering that their family is one of the most ancient in this country, and worthy of all the benevolence of government, as much for their personal merit as on account of the services [of the] father of the petitioners, I do grant to said petitioners, for
*319] them and their heirs, the land which they solicit, if it [is] not prejudicial to *anybody; and the surveyor, Don Antonio Soulard, shall put the interested party in possession of the quantity of land asked for, in one or two vacant places of the royal domain, after which he shall draw a plat, which he shall deliver to the interested parties, with his certificate, to serve them in obtaining the concession and title in form from the Intendant-General, to whom alone corresponds, by royal order, the distributing and granting all classes of lands of the royal domain.

"CARLOS DEHAULT DELASSUS.

"A true translation.

"JULIUS DE MUN.

"*St. Louis, October* 27, 1832."

On the 11th of February, 1806, Benito Vasquez, the eldest son, assigned his 800 arpens to Rudolph Tillier.

On the 27th of February, 1806, a survey and plat of the land was made by James Mackay, locating it about two miles

northwest of St. Louis, as appeared by the following certificate:—

"I do certify, that the above plat represents 800 arpens of land, French measure, situated in the district of St. Louis, Louisiana Territory, and surveyed by me at the request of the proprietor, who claims the same by virtue of a Spanish grant.

"Given under my hand at St. Louis, this 27th day of February, in the year of our Lord 1806.

"JAMES MACKAY.

"Received for record, St. Louis, February 27, 1806.

"ANTOINE SOULARD,

"*Surveyor-General Territory Louisiana.*"

On the 25th of August, 1806, Tillier filed his claim before the first Board of Commissioners. There were two plats filed, covering different tracts of land, both of which plats were upon the same sheet of paper; but upon the face of one of them was written the name of the claimant at full length. This one included the land in controversy, and was the only one considered by the commissioners.

On the 22d of September, 1810, the board decided that this claim "ought not to be confirmed."

On the 3d of October, 1832, this claim was brought before another Board of Commissioners, which, on the 2d of November, 1833, passed the following order:—

"*Saturday, November 2d*, 1833.

"The board met pursuant to adjournment. Present, Lewis F. Linn, A. G. Harrison, F. R. Conway, Commissioners.

*"The sons of Vasquez, each claiming 800 arpens of land under a concession from Charles Dehault Delassus. [*320 See page 17. The board remark, that they can see no cause for entertaining the idea that the said concession was not issued at the time it bears date, as intimated in the minutes of the former commissioners.

"The board are unanimously of opinion, that this claim ought to be confirmed to the said Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, or their legal representatives, according to the concession.

"The board adjourned until to-morrow, at 9 o'clock, A. M.

"L. F. LINN,

F. R. CONWAY,

A. G. HARRISON."

This claim was confirmed by the act of Congress of 4th July, 1836, and again surveyed by the United States surveyor

on the 29th of March, 1842, according to the original survey of Mackay, filed with the claim in 1806. The claim was assigned by Tillier to C. B. Penrose, who conveyed it to Mary B. (the plaintiff below) and Anna H. W. Penrose, on the 20th of February, 1823.

The title of Bissell, the defendant below, was as follows.

The defendant produced and read in evidence,—

1. A certificate issued by the recorder of land titles, No. 164, dated 4th November, 1816, whereby it is certified, that, in conformity to the provisions of an act of Congress of 17th February, 1815, John Brooks, or his legal representatives, is entitled to locate 709 arpens on any of the public lands of the Territory of Missouri, the sale of which is authorized by law.

2. The location and survey thereof, No. 2541, made in March, 1818, which includes the land in controversy.

3. A patent certificate, No. 308, issued by the recorder of land titles, 17th November, 1822, whereby it is certified, that, in pursuance of an act of Congress passed the 17th of February, 1815, a location certificate, No. 164, issued from the office of the recorder, in favor of John Brooks, or his legal representatives, for 709 arpens of land, that a location had been made by the plat of survey, No. 2541, and that the said John Brooks, or his legal representatives, is entitled to a patent for the said tract, containing, according to the location, $603\frac{14}{100}$ acres, in township 45 north, range 7 east.

It was admitted that the title of John Brooks was vested in the defendant below, by mesne conveyances, on the 14th of February, 1824; and it was proved that one Brady, under whom the defendant below acquired title, had his mansion-
*321] house *adjacent to the land in controversy, and occupied a part thereof before the year 1824, and that the same has been ever since occupied; that the defendant Bissell extended his improvements over the whole fifty-five acres as early as 1829 or 1830.

The defendant then asked the following instructions, which the court refused to give, and each of them; to which refusal the defendant by his counsel excepted; which instructions are in the words and figures following:—

Instructions refused.

1. That the land sued for in this action was not reserved from sale by the act of Congress of 3d March, 1811, in consequence of the filing of the claim of Rudolph Tillier, with the concession to Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, and other documents, with the recorder of land titles, as given in evidence in this case.

2. That the confirmation by the Board of Commissioners to Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, given in evidence in this case, ratified by act of Congress of 4th July, 1836, did not vest any title in the land sued for in this action in the plaintiff.

3. That the plaintiff has shown no title on which she can recover of the defendant the land sued for in this action, or any part thereof.

4. That the plaintiff, if entitled to recover in this action, can recover only the undivided tenth of so much of the land sued for as the defendant was in possession of at the commencement of this suit.

5. If the jury find from the evidence that Rudolph Tillier, under whom the plaintiff in this case claims the land in question, filed his claim with the recorder of land titles, and, as a part of the evidence of his claim, filed two plats of the land claimed, one of which plats would embrace the land now in the defendant's possession, and the other would not embrace that land, then there is no reservation of the land in defendant's possession from sale, which would prevent the location of the land in question, under the certificate in favor of John Brooks, or his legal representatives.

6. That the confirmation of the claim of Benito Vasquez and others, given in evidence by the plaintiff, being according to the concession, is in itself a rejection of the survey made by Mackay, which has been given in evidence; and under that confirmation there is no authority for a survey upon the land located under the certificate in favor of John Brooks, or his legal representatives.

*7. That the survey given in evidence by plaintiff, of 800 arpens, made by Mackay in 1806, being a mere private survey made of a part of the public domain, in violation of an act of Congress prohibiting such surveys at that time under severe penalties, is not in law any part of the claim filed before the recorder of land titles, and cannot come in aid thereof, so as to work a reservation from sale, under the act of Congress of 3d March, 1811, of said 800 arpens. [*322

The plaintiff then asked the following instruction, which the court gave; to the giving which the defendant, by his counsel, excepted. Which instruction is as follows:—

Instruction given.

That the land included in the survey given in evidence, and which was made for Rudolph Tillier, assignee of Benito Vasquez, on the 27th of February, 1806, by James Mackay, and which was officially re-surveyed in conformity to the act of

Congress of the 4th of July, 1836, and which re-survey is numbered 3,061, and was approved by Jos. C. Brown on the 29th of March, 1842, was reserved from location and sale at the time McNight and Brady's location, under a New Madrid claim, was made; and, therefore, the location under said claim is invalid as against the title of said Vasquez, or those claiming through him, to the extent that the two claims cover the same land, and that the land included by both the surveys aforesaid is the land confirmed to Benito Vasquez, or his legal representatives, by the act of Congress of the 4th of July, 1836, and that the confirmation operated as a grant to said Vasquez, or his legal representatives; such being the legal effect of the acts of Congress, records, and title-deeds given in evidence.

And the defendant prays the court to sign and seal this his bill of exceptions, which is done accordingly.

J. CATRON. [L. S.]

Upon this exception the case came up to this court.

It was very elaborately argued by *Mr. Benton* and *Mr. Gamble*, for the plaintiff in error, with whom was *Mr. Geyer*, and by *Mr. Good* and *Mr. Ewing*, for the defendant. It is impossible to do more than state the points raised by the counsel respectively.

Those on behalf of the plaintiff in error were the following:

I. The report of the late Board of Commissioners, ratified by the act of the 4th of July, 1836, is not a confirmation according to either of the plats of survey filed by Rudolph
*828] Tillier, under whom the defendant in error claims, nor of any survey, but *operates as a grant, according to the concession of 4,000 arpens of land, to be located in one or two places of the public domain.

1. The confirmatory act confirms nothing but the concession, the only document mentioned or referred to in the decision, and therefore it cannot be assumed that any survey, or plat of survey, whatever, was adopted. *Mackay* v. *Dillon*, 4 How., 448. It is a public grant, and passes nothing that is not described in terms, or by specific reference to something out of it. *Blake* v. *Doherty*, 5 Wheat., 359; Dyer, 350 *b*, 362 *a*; Cro. Car., 169; 10 Co., 65, 112 *b*; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420.

2. The concession is a floating warrant of survey, conferring no title to any specific land, and a confirmation in terms, according to that concession, does not give it a special location or boundaries. *Forbes's case*, 15 Pet., 184; *Buyck's case*, Id.,

215; *O'Hara's case*, Id., 275; *Delespine's case*, Id., 319; *Miranda's case*, 16 Id., 159, 160; *United States* v. *King*, 3 How., 773; *Mackay* v. *Dillon*, 4 Id., 448.

3. If anything can be resorted to, other than the decision and the concession to which it refers, for the purpose of determining the legal effect of the grant, it must appear by the transcript laid before Congress, and that cannot be contradicted, altered, or varied by oral evidence. 1 Phil. Ev., 218, 423; 3 Stark. Ev., 995–997.

4. The particular survey mentioned in the instruction given at the trial, if in fact executed, was prohibited by law, and is a mere nullity, (*United States* v. *Hanson*, 16 Pet., 196,) and was never recognized by the recorder and commissioners as the foundation of the claim, or as evidence of its location and boundaries.

5. The claim, considered by the recorder and commissioners under the act of 1832, was made by the original grantees, on the concession alone, and the decision by special reference to that claim and concession excludes all other claimants and documents. Co. Lit., 210 *a*, 183 *b*.

6. No plat of survey was transmitted with the transcript, or in any form presented to Congress. The confirmatory act, therefore, can have reference only to the face of the concession, regardless of any survey whatever. *Mackay* v. *Dillon*, 4 How., 448; *McDonogh* v. *Millaudon*, 3 Id., 693.

II. Whatever land is granted or confirmed by the report and act of Congress, is granted or confirmed to the five sons of Vasquez, named in the decision of the commissioners, or their legal representatives, and not to any one of them, and his representatives, in exclusion of all the others.

*1. The concession does not contemplate or authorize a severance of the interest of the grantees, by survey or otherwise, by the act of one of them or his representatives. [*324

2. No survey for any one of the grantees has ever been recognized by the government.

3. Every claim under the concession in severalty was rejected by the first Board of Commissioners, and none such was presented to, taken up, or recognized in any form, under the act of 1832.

4. The decision, as entered in the transcript, and confirmed by Congress, is in terms in favor of all the original grantees, by name, according to the concession, and no one of them can be excluded from the benefit of the grant, or preferred in the location.

III. The defendant in error is not the legal representative

of Benito Vasquez, Jr., or of any of the grantees named in the decision of the commissioners, and acquired no title to the land sued for, by the confirmation.

1. The instrument of writing purporting to be a transfer from Tillier to C. B. Penrose, under which alone she claims, not being a deed, is inoperative as a conveyance of a freehold estate. *Moss* v. *Anderson*, 7 Mo., 337; *McCabe* v. *Hunter's Heirs*, Id., 355.

2. That instrument is, in terms, a mere assignment of the interest of Tillier in the concession and plats of survey, and does not purport to convey lands. No interest in lands passes by a mere assignment of evidences of title. 2 Ohio, 221; *Fitzhugh* v. *Croghan*, 2 J. J. Marsh. (Ky.), 429.

3. Taken as an operative conveyance of land, the transfer does not pass an estate of inheritance. *Martin* v. *Long*, 3 Mo., 391.

4. The transfer, if otherwise unexceptionable, at most conveys only such right, title, and interest as the grantee had at the time; the title, if any, afterwards acquired by the confirmation, does not inure to his grantee. *McCracken* v. *Wright*, 14 Johns. (N. Y.), 193; *Jackson* v. *Hubble*, 1 Cow., (N. Y.), 613; *Jackson* v. *Winslow*, 9 Id., 13; *Jackson* v. *Peck*, 4 Wend. (N. Y.), 300; Missouri Stat., Rev. Code, 1825, p. 217; *Landis et al.* v. *Perkins*, 12 Mo.

IV. The instruction given at the trial, "that the land included in the survey given in evidence, and which was made for Rudolph Tillier, assignee of Benito Vasquez, on the 27th of February, 1806, by James Mackay, and which was officially re-surveyed by survey No. 3061, was reserved from location and sale at the time the location under the New Madrid claim was made," erroneous, because,—

*325] *1. The survey referred to was not only private and unauthorized, but prohibited by positive law, and is of no effect whatever, as fixing the locality and boundaries of the concession, or as the foundation of a claim. *Garcia* v. *Lee*, 12 Pet., 511; *Smith's case*, 10 Id., 327; *Wherry's case*, Id., 338; *Jourdan et al.* v. *Barrett*, 4 How., 169; *Mackay* v. *Dillon*, Id., 448.

2. The plat of a private or forbidden survey is not authorized or required to be filed with the recorder of land titles; and being, in this case, both made and filed contrary to law, is of no effect for any purpose. *Kerns* v. *Swope*, 2 Watts (Pa.), 75; *Heister* v. *Fortner*, 2 Binn. (Pa.), 40; *Dewitt* v. *Moulton*, 5 Shep. (Me.), 418; *Blood* v. *Blood*, 23 Pick. (Mass.), 80; *Summer* v. *Rhodes*, 14 Conn. 135; *Mummey* v. *Johnston*, 3 A. K. Marsh. (Ky.), 220.

3. The concession containing no special location, and the survey being an absolute nullity, no particular tract of land was brought within the proviso of the tenth section of the act of March, 1811.

4. There were two plats of survey filed at the same time, differing from each other, and, nothing appearing on the record to distinguish which of them designates the land claimed, the court was not authorized to elect between them. *Mackay* v. *Dillon*, 4 How., 448.

5. The official survey, No. 3061, has no effect on the question of reservation.

6. What particular land was embraced by the plats originally filed depended upon facts to be proved *aliunde*, and upon which the identity was to be found by the jury, and not by the court or by the act of the surveyor.

7. The reservation of the land included in the survey for Tillier, in 1806, if any there was, ceased before the location, under which the plaintiff in error claims, was made.

V. If it shall be held that the location was made on land within the proviso of the tenth section of the act of 3d March, 1811, and while it was in force, "the legal effect of the acts of Congress, records, and title papers, given in evidence," is not to render the location invalid as against the confirmation by the act of 1836.

1. The location, survey, and patent certificates being in other respects regular, vested in John Brooks, or his legal representatives, a title valid against the United States, which was defeasible only by a confirmation of the conflicting claim during the continuance of the reservation. *Barry* v. *Gamble*, 3 How., 32; *Stoddard* v. *Chambers*, 2 Id., 317; *Polk's Lessee* v. *Wendell*, 5 Wheat., 293; *Bagnell* v. *Brodrick*, 13 Pet., 436; **Strother* v. *Lucas*, 6 Id., 763; 12 Id., 410; [*326 *Grignon's Lessee* v. *Astor*, 2 How., 319; *Chouteau* v. *Eckhart*, Id., 376; *Carroll* v. *Safford*, 3 Id., 460; *Levi* v. *Thompson*, 4 Id., 17.

2. The reservation, if any, ceased at least as early as the 26th of May, 1829, and thereby the title under the location became indefeasible, and could not be affected by legislation afterwards. *City of New Orleans* v. *D'Armas*, 9 Pet., 224; *Fletcher* v. *Peck*, 6 Cranch, 87; *Wilkinson* v. *Leland*, 2 Pet., 657.

3. The act of the 9th July, 1832, has no effect whatever on the land or the title under the location. Having no retrospective operation upon any vested interest, it cannot defeat a title indefeasible when it was passed.

4. Neither the claim of Tillier, nor of any other person, to the particular land described in either of the surveys, was presented,

considered, or reported upon, under the act of 1832, and consequently there was no reservation of that land created, revived, or continued by that act.

5. The confirmation by the act of 1836 does not relate to any antecedent period, so as to overreach a title before valid against the United States. *Jackson* v. *Bard*, 4 Johns. (N. Y.), 230; *Heath* v. *Ross*, 12 Id., 140; *Strother* v. *Lucas*, 12 Pet., 410; *Chouteau* v. *Eckhart*, 2 How., 376; *Les Bois* v. *Bramell*, 4 Id., 449.

6. There was no confirmation of the claim of Tillier, or of any other person, for the land described in either of the plats filed in 1806.

7. The confirmation to the five sons of Vasquez, "according to the concession," has no effect whatever upon the land previously located, or the title under the location.

8. The survey No. 3061 is not in conformity with the confirmation, and, to the extent of its interference with the previous location, is void.

VI. The second section of the act of Congress of the 4th July, 1836, confirms the title under the location, survey, and patent certificate, as against any confirmation, notwithstanding any previous reservation of the land from sale.

1. It does not enlarge, but restrains and limits, the operation of the first section, by a condition annexed to the confirmation.

2. Its object is to affirm locations and sales, which, on account of some infirmity, needed, or were supposed to require, legislative aid, not those which, being valid and regular, needed no affirmance. *Jackson* v. *Clark*, 1 Pet., 635.

*327] 3. The defects and irregularities intended to be cured are *common to both locations and sales, and which, if not cured, it was supposed might give priority to the confirmations.

4. The confirmations are in conflict with the titles under locations or sales, only when the lands located or sold are reserved from sale by reason of the filing of the claim confirmed, in due time and according to law.

5. No titles under locations or sales are protected, if none are protected but those made on lands not reserved, which is to render the second section of the act of 4th July, 1836, superfluous and insignificant; for such titles need no legislative aid, as against a confirmation. 8 Co., 274 *c*; *Fletcher* v. *Peck*, 6 Cranch, 87; *City of New Orleans* v. *D'Armas*, 9 Pet., 224.

The counsel for the defendant in error considered the case of *Stoddard* v. *Chambers*, 2 How., 284, as ruling all the points

involved in the present case. Nevertheless, as it had been brought up and argued as new matter not included within the decision of the court in that case, they would consider it as such, and therefore presented the following points:—

The plaintiff in error derives his title by regular transmission under a New Madrid certificate, which was located in March, 1818, on the land in controversy. A "patent certificate" was issued to him on the 17th November, 1822, but no patent. He has had possession since 1829. His rights, if any he be adjudged to have, were conferred by the act of the 17th of February, 1815, known as the New Madrid act. In virtue of this act he was authorized to locate his certificate on any of the public lands of the territory of Missouri, the sale of which was, at the time of such location, authorized by law.

1st. In support of the claim as shown by the defendant in error, we shall rely on the treaty of 1803, in virtue of which the Missouri territory was acquired; the Act of Congress of 2d of March, 1805; the Act of the 15th of February, 1811, ch. 81, § 10; the Act of the 3d of March, 1811, § 10; and also the Act of the 17th of February, 1818; all of which, we shall contend, recognized the validity of the plaintiff's claim, and operated as a reservation thereof from any disposition or sale by the United States prior to the passage of the act of the 26th of May, 1824. We shall cite the opinion of this court in 4 Pet., 512, repeated in 10 Id., 330, and the case of *Strother* v. *Lucas*, 12 Id., 436, to show the nature of the plaintiff's claim, and his right to a recognition and a confirmation of that claim by the United States. We shall rely upon the authority of these cases to show that the claim was, at least, an equitable right, which, under the Spanish government, must have been *perfected;—the United States [*328 are bound by every consideration which could operate upon the government of Spain, to perfect this right.

2d. We shall contend that there has been no forfeiture of this claim, by virtue of the act of the 26th of April, 1804, or that of 1807, or by any act subsequent thereto, and having reference to the same subject; that these acts never were in fact intended to operate as a penalty or forfeiture, but were merely precautionary and provisional. We shall further contend that the position of the plaintiff is not more unfavorable than that of the pre-emptioner, who, although a trespasser upon the public domain, has yet been recognized by the state authorities and by the United States as having a claim in virtue of his pre-emption, which could not be defeated by a New Madrid certificate and location, or even by a patent issued thereon. *Rector* v. *Welch*, 1 Mo., 238. Opinion of

Attorney-General, Wirt, in a letter to the Secretary of the Treasury, dated 27th January, 1821; and the Act of 2d March, 1831, in reference to, and embodying the opinion of the Attorney-General on this subject.

3d. That the effect of the act of the 26th of May, 1824, and the act in revival thereof, passed 24th May, 1828, was not to divest the title of the plaintiff so as to exclude it from the operation of the revival act of the 9th of July, 1832, and that that act must be regarded as a waiver of all penalties and forfeitures, if any such were ever designed by the United States to attach to claims like the one in question. There were hundreds of thousands of acres of land claimed by no higher title than that of a concession and mere order of survey; and yet there is no case of forfeiture on record. Soulard Letter, State Papers, Miscellaneous, Vol. I., p. 405.

4th. That this case differs from *Smith's case*, reported in 10 Pet., 327; also from that of *Mackay*, as reported in *Barry* v. *Gamble*, 8 How., 32; and still further from that of *Les Bois* v. *Bramell*, 4 Id., 456.

The claim of the plaintiff could not be defeated by any act of legislation, without a disregard of the treaty of 1803, and a direct denial of the equitable obligation imposed by the acts of Congress already cited, and which obligation has been repeatedly recognized by the agents of the United States, who, having assumed the trust existing between the government of Spain and the party under whom the plaintiff claims, could not defeat that trust by conditions imposed by them subsequent to the transfer of said trust. Analogies from the law of England will be cited to sustain this view, as also the opinion of this court in the case of *Percheman*, 7 Pet., 90.

*329] *5th. That the act of the 9th of July, 1832, embraced this claim; its existence was thereby recognized, and the right to a confirmation of it clearly implied; that the confirmation by the Board of Commissioners, on the 2d day of November, 1833, and which was approved and made conclusive by the act of the 4th of July, 1836, completes the title of the defendant in error; and that no one claiming the land in question from the United States, by virtue of any sale or grant made by them subsequent to the location and survey by Tillier in 1806, can hold said land as against the legal representatives of the Spanish grantee. Opinion of the court in the case of *Stoddard* v. *Chambers*, 2 How., 284, and the authorities therein cited.

The title of the plaintiff in error cannot, we think, be shown to be entitled to the serious consideration of this court,—

1st. Because the certificate and location in virtue of which

he claims conferred no right: the location was on lands, the sale of which was not at the time authorized by law; and it was therefore absolutely void. Opinions of Attorney-General, Wirt, October 10, 1825; Opinions, &c., Vol. II., p. 25, reference to letters of Secretary Crawford, June 10th, 1818; of Mr. Wirt, October 22, 1828; and of Mr. Butler, Attorney-General, August 8th, 1838. *Stoddard* v. *Chambers*, and the authorities therein cited, 2 How., 284.

2d. The location, having been on lands the sale of which was not authorized by law, was not only void, but could not be revived except by special act of legislation, the same as in the case of a location of a new Madrid certificate upon lands claimed by a pre-emptioner. Letter of Mr. Wirt, Attorney-General, to Secretary Crawford, June 19th, 1820; also, letter from same to same, under date of the 22d June, on the same subject; the Act of April 26, 1822; and also Act of 2d March, 1831.

There was no act of Congress subsequent to the 26th of May, 1829, and before the 9th of July, 1832, giving the plaintiff in error the right to re-locate his certificate; and if there had been, we should not be willing to admit that a location thus made upon the land in question, although protected by a patent, could prevail against the Spanish grant; but there being no such location or patent, we contend that the New Madrid locator, notwithstanding the land in question should be regarded as public land during the interval mentioned, is in no better condition in regard to said land than he was prior to said interval. His location was void in its inception; nothing less than a special act of Congress could revive and make it available. To contend, as we understand the plaintiff in error will, that, *although the New Madrid certificate was originally located on land at the time not [*330 authorized to be sold, yet it became public land in the interval between the 26th of May, 1829, and the 9th of July, 1832, and was therefore subject to his claim, as it were by relation back to 1818, when his claim was first located,—is, we think, an assumption not less unreasonable than it would be to contend that location under a New Madrid certificate on mineral lands or school lands specially reserved from sale at the time, but subsequently authorized to be sold, would be held good, and entitle the party to a patent, even as against the United States. It cannot be supposed that this court would countenance such a doctrine as this; and yet it is not, as we think, less worthy of their serious consideration, than the position assumed in this doctrine of relation so earnestly insisted on by the plaintiff in error.

It will, we presume, be contended, that the confirmation, "according to the concession," shall be construed to mean a confirmation, not of 800 arpens to Benito Vasquez, or his legal representatives, but a confirmation of 4,000 in common to all the brothers. The proceedings from 1806 to 1833, by the Board of Commissioners, and which are in evidence, show conclusively that such was not and could not have been the design of the board who confirmed the claim; but the testimony of Conway, one of the board who confirmed said claim, frees this question from all doubt. His testimony explains what otherwise might admit of dispute. It shows that there was but one plat before the board; they took proof as to that plat; they were satisfied therewith. Its not being referred to in the tabular statement made out by the clerk of the board is likewise satisfactorily explained by the testimony of Conway, one of the commissioners by whom this claim was confirmed. To show the manner of proceeding in this and like cases, we refer to the cases of Gabriel Cerré, 5 American State Papers, 821; St. Gemme Beauvais, Id., 744; Raphael St. Gemme, and others, Id., 745; Thomas Maddin, Id., 747; Joseph Morin, Id., 819; James Williams, Id., 820; Charles Fremon Delauriere and Louis Labeaume, Id., 822; James Richardson, Id., 823; Pierre Detor, Id., 824; Louis Bissonet, Id., 828; Thomas Caulk, Id., 831; Auguste Choteau, Id., 834.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court for the District of Missouri. The case below was an action of ejectment by the plaintiff, (the defendant here,) to recover against the defendant a moiety of a tract of land in the township of St. Louis, and in which she obtained a verdict and judgment.

*331] *The title of the plaintiff was derived from a confirmed Spanish concession, under the act of June 30, 1836; of the defendant, from a location of a New Madrid certificate, under the act of February 17, 1815. Both rest upon acts of Congress; and the question is which has the elder or better title.

We shall, therefore, lay out of view, in proceeding to the examination of the case, a class of cases referred to on the argument, founded on these Spanish claims, which were prosecuted under the act of May 26, 1824, and which underwent very elaborate discussion, both at the bar and by the court. *United States* v. *Arredondo et al.*, 6 Pet., 691; *Soulard and others* v. *United States*, 4 Id., 511; *Smith* v. *The same*, 10 Id., 326; *United States* v. *Clarke*, 8 Id., 436.

That act empowered the District Court, upon which original

jurisdiction was conferred, to hear and determine these claims according to the stipulations of the treaty of 1803, the law of nations, and the laws and ordinances of the Spanish government, and in conformity with the principles of justice.

The inquiry there was not into the legal title; but into the equitable right under the treaty, with a view to a confirmation of these imperfect grants, if entitled to confirmation according to Spanish law, so that the grantee might be clothed with the legal estate.

The inquiry was difficult and embarrassing, on account of the scanty and imperfect materials within the reach of the courts from which to collect Spanish laws and ordinances, as they consisted of royal orders, orders of the local governors, and also of the usages and customs of the provinces, which were not readily accessible to the profession or the courts in this country.

The case before us depends upon the construction of our own acts of Congress, disembarrassed from any inquiries into the origin of these grants, or into the rights and principles upon which they were founded, or which made it the duty of the government under the treaty to acknowledge them. Inquiries of this kind were closed on the confirmation of the grant by the act of 1836. The title then became complete. It became an American, not a Spanish title.

One of the principal questions arising under these acts of Congress, and, indeed, in our judgment, every material question presented here, was either directly or by necessary implication involved in the decision of the case of *Stoddard* v. *Chambers*, heretofore decided by this court and reported in 2 How., 284.

The plaintiff there claimed under a Spanish concession, confirmed by the act of 1836; the defendant, under a location by *virtue of a New Madrid certificate, in [*332 pursuance of the act of 1815. The defendant and those under whom he claimed had been in possession since 1819. The Spanish concession was, like the one before us, general and unlocated, except by a private survey in January, 1806.

The court decided that the plaintiff, deriving title under the confirmed claim, held the better title, on the ground, that in 1816, when the New Madrid certificate was located upon the premises in question, the tract was reserved from sale or private entry by virtue of the tenth section of the act of 1811, and being thus reserved, the location was void; and, further, that it was not within the protection of the second section of the act of 1836, confirming Spanish grants, as the locations there referred to were locations made in pursuance of some

law of the United States; that, in the case before the court, it was made against law.

In the case before us, the Spanish concession was made to the five sons of Benito Vasquez, for eight hundred arpens each, to be laid off in one or two places of the vacant domain. The grant was made February 16, 1800.

The eldest son (Benito) conveyed his interest in the concession to Rodolph Tillier, 11th February, 1806. The latter located it by procuring a private survey, the 27th of the same month.

The time when the claim was filed in the recorder's office at St. Louis, under the act of 1805, does not appear; but it must have been before the 25th of August, 1806, as we find the evidence of the claim presented to the Board of Commissioners on that day. including the grant, the survey, and other proof going to establish it.

The tenth section of the act of 1811 (2 Stat. at L., 665), provided, that, till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land titles in Louisiana, and filed in his office, for the purpose of being investigated by the commissioners, &c.

The argument against the application of the clause to the claim before us is, that the concession to Vasquez, being general and unlocated, giving a right to the eight hundred arpens in no particular part or parcel of land in the public domain, but in any and every part, and the private survey designating and locating the tract being a nullity, and to be disregarded, the premises in question were not, and could not have been, reserved from sale by the filing of this vagrant claim; and hence were open to location under the New Madrid certificate in 1816, at the date of the entry.

*333] *Now, the Spanish concession to Mordecai Bell, in *Stoddard* v. *Chambers*, under which the plaintiff derived title, was of a similar character; the private survey, therefore, must have been regarded as having designated and located the tract, so far as to give effect and operation to the reservation of it from sale.

It is only upon this ground that the case can be upheld. Otherwise, the location of the New Madrid certificate was made in pursuance of law, and the defendant in under it held the better title. The tract was not covered by any claim, within the contemplation of the act of 1811. To give effect to it, the claim must designate the particular tract.

But if this question were an open one, and to be decided the first time by the court, we should feel ourselves obliged

to re-affirm the same conclusion which we have supposed necesarily involved in the case already mentioned.

The act of 1805, § 4, (2 Stat. at L., 326,) provided, that a plat of the tracts claimed should accompany the written notice of the claim directed to be filed in the office of the recorder.

The act of 20th February, 1806, (2 Stat. at L., 352,) repealed this clause, and extended the powers of the Surveyor-General over the public lands in Louisiana, making it his duty to appoint deputy surveyors, &c., and the commissioners were authorized to direct such surveys of the claims presented, as they might deem necessary for the purpose of their decision, --the survey to be at the expense of the claimant.

The act also declared, that every such survey, as well as every other survey, by whatever authority theretofore made, should be held and considered a private survey only; and that all the tracts of land, the titles to which might be ultimately confirmed by Congress, should, prior to the issuing of the patents, be re-surveyed, if judged necessary, under the authority of the Surveyor-General, at the expense of the parties. Sec. 3.

The act of March 26, 1804, (2 Stat. at L., 283,) forbade settlements on the public lands within the territory of Louisiana; and also surveys, or any and every attempt to survey, or designate boundaries, by marking trees or otherwise, declaring, at the same time, the act an offence punishable by fine or imprisonment. Sec. 14.

The act of 1805, as we have seen, required the claimant to accompany the claim filed with a plat of the tract.

It is apparent, therefore, unless this act operated as a modification, by implication, of the restriction in the act of 1804 in respect to surveys, the benefits under it would be limited to the *single class of claimants, who had happened to procure surveys of their tracts by a Spanish officer prior to the cession under the treaty. Whether it had this effect, or not, is at this day a matter of no particular importance; it is certain, that such was the practical construction given to the act at the time; as we find that numerous surveys of the tracts claimed were made after the passage of the act of 1805, and before that of 1806 dispensing with the plat. This construction was, also, recognized by the government, and the surveys directed to be regarded by the commissioners in their proceedings, as affording a sufficient designation of the tract claimed under the concession. [*334

In the instructions of the Secretary of the Treasury to the board, under date of March 25, 1806, one month after the passage of the act, he observed, (speaking of the authority

conferred on the board to order surveys,) that, as the authority was discretionary, it was presumed they would exercise it only in cases where it would be actually necessary, as it was not intended to vex the claimants with repeated surveys; and that, where they were satisfied that those surveys which had been executed before the receipt of his communication were sufficient to enable them to form a correct decision, they need not order new ones: and the observation, he said, would apply, whether the previous surveys had been executed under the authority of Soulard, or by any other person whatever. (Part 2, Public Land Laws, p. 672.)

Nothing can be more direct and express than these instructions; and the records of the proceedings of the several Boards of Commissioners under the act of 1805, and the acts succeeding it down to that of July 9, 1832, show, that they uniformly acted upon them. These private surveys constitute a part of the evidence of the claim upon which their decision was founded.

They were necessary to give description and locality to two important classes of these Spanish concessions:—1. A grant or order of survey for a given number of arpens, conferring upon the grantee the right to locate it upon any part of the royal domain, at his election; 2. A grant designating some natural object only, such as the head or sources of a river, as the place where the tract should be located. These two classes constituted no inconsiderable portion of the claims filed in the offices of the register and recorder, and afterwards presented before the commissioners. Among the incomplete grants, they probably constituted at least one half of the number. Of the first fifty in the report of the 27th of *335] November, 1833, twenty-eight *are of this description; it is fair to presume the same proportion exists throughout.

The effect claimed, upon the above view, for these private surveys, was denied on the argument, on the authority of the cases decided under the act of 1824, to which we have already referred; but the distinction will be apparent on an examination of those cases, and a slight attention to the difference in the two modes of proceeding upon these claims.

Under that act, it was held by the court, that, in order to enable the claimant to recover, the land must have been severed from the general domain of the king of Spain prior to the cession of the territory by a grant which gives, either in its terms, or by a reference to some description, locality to the tract; or if the grant was vague, and gave only an authority to locate, the location must have been made by the official surveyor;—that a private survey could have no such effect as

to sever the tract from the public domain under either the Spanish or American government; and that no government ever admitted such effect to be given to private surveys of its warrants, or orders of survey.

In the proceedings before the Board of Commissioners, the object of the private survey is not a severance of the tract from the public domain; nor is this the effect of it; that is done by the confirmation of the grant by the act of Congress, and not before. The object is the selection of the tract by the claimant that he is entitled to locate by virtue of his general grant, by means whereof he is enabled to present his claim in full to the board for their decision. A general grant or order of survey is not simply a vagrant right to the given number of arpens in some part of the public domain; but carries along with it the right, and without which it is valueless, to have it located with metes and bounds, that it may be occupied and enjoyed. In the absence of this description and location, the claimant would be disabled from presenting his full claim under the Spanish concession for adjudication by the board. The act of 1806 providing for private surveys, and the instructions of the Secretary founded thereon, removed every embarrassment of the kind, and were, doubtless, so intended at the time.

The acts of 1832 and of 1836 confirm the above view. The former organized a new Board of Commissioners, and made it their duty to examine all unconfirmed claims to land theretofore filed in the office of the recorder, according to law, founded upon any incomplete grant, concession, warrant, or order of survey; and also, that, in examining them, they should take into consideration as well the testimony taken before the former *boards upon the claims, as such other testimony as might be admissible under the rules adopted for taking testimony before the previous commissioners. [*336

It should be recollected, that the reports of the previous commissioners upon these unconfirmed claims were before Congress at the time of the passage of this act; and that those reports contained the substance of the evidence in support of each claim, including these private surveys; and with this knowledge, it will be seen, they have made it the duty of the board to take that testimony into their consideration in passing upon them.

Congress have thus virtually recognized these private surveys as competent and proper evidence of the particular tract of land claimed under the grant or concession, carrying out thereby the construction previously given to the act of 1806, and the instructions of the Secretary.

The board are directed to examine all the unconfirmed

claims remaining in the office of the recorder, founded upon these incomplete grants, and orders of survey; and to examine them upon the evidence already furnished by the claimants, and in the possession of the government; and to show that the examinations were conducted in conformity with these directions, we need only turn to the reports of the board, at different times, to the Commissioner of the Land Office, and which were also laid before Congress. It will there be seen that these private surveys are invariably used as a part of the evidence, in each case, where one has been made, for the purpose of giving description and locality to the claim.

The concession before us is embraced in the report of the 27th of November, 1833, as No. 19. It contains the original grant, the private survey of February 27, 1806, together with the evidence of several witnesses produced by Tillier, the assignee and claimant; and among others a witness was called to prove the handwriting of the Governor to the concession, and of Mackay to the plat of the survey.

We have said that the act of 1836 also confirms this view of the case.

The second section of that act provides, that if it shall be found that any tract confirmed, or part thereof, had been previously located by any other person under any law of the United States, or had been surveyed and sold by the United States, the confirmation shall confer no title to such lands in opposition to rights acquired by such location and purchase; but the individual whose claim is confirmed shall be permitted
*337] to locate so much thereof as interferes with such location or *purchase on any unappropriated land of the government within the state.

It will be perceived that the right to re-locate by the Spanish claimant is confined to the case of an interfering location or purchase of the whole or a part of the tract of land confirmed, omitting altogether to make provision for the case of a confirmation of an unlocated concession or order of survey. If the argument, therefore, is well founded, that these surveys are a nullity, and incapable of giving description and locality to the claim, Congress have not yet provided for one half of them under the act of 1836; and further legislation will be necessary to carry into effect their clear intention, as declared in the act of 1832. We cannot think they are chargeable with any such omission or oversight, or that a proper interpretation of their acts leads to such a conclusion; but the contrary.

Our conclusion, therefore, is that the private survey by Mackay in 1806, of the 800 arpens granted to Benito Vasquez

by the Spanish governor, February 17, 1800, of which Tillier was the assignee, and which was filed in the recorder's office under the act of 1805, designated and located the grant so as to give effect and operation to the act of 1811, reserving the premises from sale, which reservation was continued down by subsequent acts to 1829.

It has been argued, that the act of 1836 confirms only the Spanish concession in the abstract, without regard to the plat of survey or claimant, if an assignee of the grant. The act provides, that the decisions in favor of land claimants made by the recorder and the commissioners, under the act of 1832 and the supplemental act of 1833, as entered in the transcript of decisions transmitted by the commissioners to the Commissioner of the Land Office, and by him laid before Congress, be, and the same are hereby, confirmed.

Now, the transcript of these decisions embraced, as required by the act of 1832, the date and quantity of each claim, and the evidence upon which each depended, together with the authority under which it was granted. The claimant was the party who had filed the claim in the office of the recorder, and had prosecuted it before the Board of Commissioners. His name, of course, appeared,—Rudolph Tillier in the case before us. He represented the interest of one of the sons of Benito Vasquez, in quantity eight hundred arpens. There were four other sons, each of whom was entitled to the same quantity. Tillier procured the private survey of his share, and filed his separate claim for that amount, together with the conveyance from the original grantee, and, under these circumstances, it is insisted *that, upon the true [*338
construction of the act, the confirmation was in favor of the son, and not of the assignee.

It is certainly difficult to perceive what right or claim the son had, either before the commissioners or Congress, to be confirmed. Having parted with all his interest, he had neither land, nor claim, nor was he a claimant; as that term is regarded as applicable to those only in whose name the claim was filed with the recorder, under the act of 1805. By that act, every person claiming lands, &c., by virtue of any incomplete grant, &c., shall deliver to the recorder a notice, &c., of the nature and extent of his claim; and, also, the grant, order of survey, deed, conveyance, or other written evidence of his claim, to be recorded; providing at the same time, in the case of a complete grant, that the claimant need only record the original grant, together with the order of survey and plat; all other conveyances and deeds to be deposited with the recorder; thereby making a distinction between the

two cases, as it respects the derivative title; and, in both, clearly contemplating that the assignee might be a claimant.

This is the view taken of the question in the case of *Strother* v. *Lucas*, on each occasion when it was before this court. (6 Pet., 772; 12 Id., 458.) It was there held that the confirmation was to be deemed to be in favor of the person claiming it. The construction has entered into the usage and practice of the land office, as may be seen by the instructions from that office and the opinion of the Attorney-General on the subject. (2 Land Laws, 747, 752, and 1043.)

As it respects the branch of the argument, that the confirmation was irrespective of the location of the tract by the private survey of Mackay, we refer to the view we have already taken of that question, without any further remark.

It has also been argued, that Tillier put on file in the recorder's office, at the time of giving notice of his claim, two plats of the tract of land he claimed, each embracing different parcels; and that the uncertainty as it respects the parcel claimed under the concession takes the case out of the reservation from sale under the act of 1811.

The case shows that there were two plats protracted upon the same sheet of paper on the files of the office, covering different parcels; and that the name of the claimant was written at full length on the face of one of them; that but one was before the commissioners, and that corresponding to the one on file with his name upon it; that this one includes the premises in question; the other does not.

*339] When this second plat was protracted upon the same sheet *of paper, or how it came on the files of the office, or whether Tillier was in any way connected with it, are matters unexplained at the trial, and left altogether to conjecture. The connection is but an inference from the fact, that it has been found on the same piece of paper on which his was protracted; but, as his was marked, and identified with his name, and that too in connection with his claim to the tract, also on file, we do not perceive that any one could be misled who might resort to the office for the purpose of ascertaining the land thus intended to be appropriated; and as it respects the proceedings before the commissioners, also on the files of the office, none of the objections taken existed in point of fact.

It has been supposed that this case is distinguishable from the case of *Stoddard* v. *Chambers*, on the ground that there the concession was confirmed, in terms, according to the survey. If the view we have taken of these private surveys be correct, the difference at once disappears. But with reference more particularly to the objection, it is to be observed, that in

the report of the commissioners under date of 27th November, 1833, which included one hundred and forty-two claims, of which the present case is one, the form of their decision as expressed, in respect to these imperfect grants, is uniformly in the words here used.

In the report of the board in 1835, in which the confirmation of the claim in *Stoddard* v. *Chambers* is included, a change of persons having taken place in the commission, a different and more particular form of expression was adopted. They, usually, confirmed according to the survey, or according to the possession, or a given number of arpens, as the case might be.

In cases where the report recommends the confirmation of the claim according to the survey, the effect of the confirmation under the act of 1836 is, probably, to conclude the government; so that an error in the private survey cannot be corrected on a re-survey of the tract. When recommended in the general form of the present case, any such error may be corrected, agreeably to the intention of Congress in declaring, as they did, in the act of 1806, that these surveys should be regarded only as private surveys. This is the distinction made at the land office, founded upon the opinion of the Attorney-General; and is, we think, the only one between the two cases.

It was also suggested, on the argument, that the cases of *Mackay* v. *Dillon*, and *Les Bois* v. *Bramell*, (4 How., 421, 449,) contained principles in support of the defence in this case. We have examined them attentively, and find nothing decided there in conflict with the views expressed in this case.

*In the former, the question was between a confirmed Spanish grant and the commons of the city [*340 of St. Louis, under which the defendant held; and which had been, also, confirmed by the act of 1812. There had been a private survey of the commons by Mackay in 1806, and in which he had at the same time marked the boundaries of his own lot. His claim was confirmed under the act of 1836; the claim to the commons, as we have seen, in 1812; the latter, therefore, holding the elder title. But the confirmation of the commons was very special, the act declaring that all the rights, titles, and claims to town or village lots, out lots, common field lots, and commons, in, adjoining, and belonging to the several towns or villages, including St. Louis, which lots have been inhabited, cultivated, or possessed prior to the 20th of December, 1803, shall be, and the same are hereby, confirmed to the inhabitants of the respective towns or villages, &c.; and making it the duty of the principal deputy surveyor,

as soon as may be, to survey and mark, where the same had not already been done according to law, the out boundary lines of the several towns and villages, so as to include the out lots, common field lots, and commons thereto respectively belonging.

The act of 1831 (4 Stat. at L., 435) has no bearing upon the question of boundary.

The question of boundary being left at large by the very special terms of the act of confirmation, a great deal of evidence was given on the trial for the purpose of ascertaining the limits of these lots, out lots, common field lots, and commons in and adjoining the town. But the court, in submitting the case to the jury, instructed them, virtually, that the boundary and extent of the commons were to be determined by the private survey of Mackay in 1806; an error that was obvious, whether we regard the terms of the act of confirmation, or the nature and effect of the survey; and for which the new trial was granted.

There is nothing in the other case bearing upon the question except that the second instruction given and approved favors the views expressed in the case before us.

The case of *Jourdan* v. *Barrett*, 4 How., 169, was also referred to as bearing upon the question. The case involved the right to back lands on the Mississippi River between front proprietors; and an attempt was made by the defendant to conclude the right by the effect of a private survey, which was properly denied by the court. The case has no application to the present one. No such effect is claimed for the survey, and all that is contended for in respect to it is derived from acts of *Congress, and applies only to the class of cases in question. The effect depends upon the construction of these acts.

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Upon the whole, after the most careful consideration that we have been able to bestow upon the case, the conclusions at which we have arrived are,—

1. That the private survey by Mackay, on the 27th of February, 1806, of the 800 arpens granted to Benito Vasquez, of whom Tillier was the assignee, and which was filed in the recorder's office with his claim, under the act of the 2d March, 1805, designated and located the grant, so as to give effect and operation to the act of 1811, reserving the premises in question from sale.

2. That the title was confirmed to Tillier, the assignee, as claimant, under the act of 1836.

3. That the location of the New Madrid certificate in 1816, under which the defendant holds, was inoperative and void,

as has already been decided in the case of *Stoddard* v. *Chambers*, heretofore referred to.

It follows, therefore, that the plaintiff, deriving title under Tillier, the confirmee, has an elder and better title, as was decided by the court below.

For these reasons, we are of opinion that the judgment of the court should be affirmed.

Mr. Justice McLEAN dissented.

In my judgment, this case is not within the decision of the case of *Stoddard* v. *Chambers*. In that case, the claim was confirmed "to the said Mordecai Bell or his legal representatives, according to the survey." But in this case the claim was confirmed "according to the concession." Now, [illegible] a concession is located, it can give no claim to any specific tract of land, and consequently cannot come within the reservation of any of the acts of Congress. And the main question in the case was, whether there was such a survey or designation of this concession as to bring it within the above acts.

The first Board of Commissioners, who acted on this claim in 1806 and in 1810, rejected it. As appears from their record, the concession only was before the board when they finally acted upon the subject. But a new and more favorable board was constituted in 1832, and it appears from their record, that, on the 9th of October in that year, "the sons of Vasquez, Benito, Antoine, Hypolite, Joseph, and Pierre Vasquez, claiming 800 arpens each under a concession dated 17th of February, 1800, was presented. Also a plat of survey dated 7th February, 1806, of 800 arpens." "Pascal Cerré, being duly sworn, *saith, that the signature to [*342 the concession is in the handwriting of Delassus; that the signatures to the survey are in the handwritings of Mackay and Antoine Soulard."

On the 2d of November, 1833, the board again met, and their record states that "the sons of Vasquez, each claiming 800 arpens of land under a concession from Charles Dehault Delassus;" and that "they can see no cause for entertaining the idea that the said concession was not issued at the time it bears date, as intimated in the minutes of the former commissioners." And they "are unanimously of opinion, that this claim ought to be confirmed to the said Benito, Antoine, Hypolite, Joseph and Pierre Vasquez, or their legal representatives, according to the concession."

On the 11th of February, 1806, Benito conveyed to Rudolph Tillier his "right, title, and interest, claim and pretension and demand, in and to a certain tract of land not yet located or

surveyed." And Tillier says, "I do hereby assign, transfer, sell, and set over, unto Clement B. Penrose, all my right, title, interest, property, claim, and demand of, in, and to a certain concession purchased of Benito Vasquez and assigned to me on the 11th of February, 1806, and plat of survey made for me, and dated 27th February, 1806, for value received." This assignment bears no date, but it was acknowledged the 31st of October, 1818.

Frederic R. Conway, a witness for plaintiff, testified that he was one of the late Board of Commissioners that confirmed this claim; that the said original survey of Mackay, given in evidence by plaintiff, was the plat that Tillier claimed by, as he understood it; and that no other survey was exhibited to the Commissioners, so far as he remembered, connected with this claim; that the survey was not noted in the tabular statement contained in the proceedings of said board, which omission, he thought, was by the mistake of the clerk.

The following certificates of surveys were given in evidence, one by the plaintiff and the other by the defendant:—"I do certify that the above plat represents 800 arpens of land, French measure, situated in the district of St. Louis, Louisiana territory, and surveyed by me at the request of the proprietor, who claims the same by virtue of a Spanish grant. Given under my hand at St. Louis, the 27th day of February, 1806. Signed, James Mackay. Received for record, St. Louis, the 27th of February, 1806. Signed, Antoine Soulard, Surveyor-General of Louisiana."

The other certificate is in the same words. These plats *843] and certificates were recorded by the recorder of land titles on the *same page. It was proved that one of these surveys covered the land in controversy, and that the other did not. The name of Tillier was written on one of the plats, but by whom, at what time, and under what circumstances, does not appear. From the loose manner in which the recorder's office and the papers connected with it seem to have been kept, and the ready access to them by all parties, it would be a dangerous principle of evidence, to consider the simple indorsement of a name on a plat as identifying the owner of the land. And especially where the surveyor nowhere states for whom the survey was made.

The court instructed the jury, "that the land included in the survey given in evidence, and which was made for Rudolph Tillier, assignee of Benito Vasquez, on the 27th of February, 1806, by James Mackay, and which was officially re-surveyed in conformity to the act of Congress of the 4th of July, 1836, and which re-survey is numbered 3061, and was

approved by Joseph C. Brown on the 29th of March, 1842, was reserved from location and sale at the time McNight and Brady's location, under a New Madrid claim, was made, and therefore the location under said claim is invalid, as against the title of said Vasquez," &c.

Among the instructions prayed for by the defendant, which the court refused to give, was the following:—5. "If the jury find from the evidence that Rudolph Tillier, under whom the plaintiff in this case claims the land in question, filed his claim with the recorder of land titles, and, as a part of the evidence of his claim, filed two plats of the land claimed, one of which plats would embrace the land now in the defendant's possession, and the other would not embrace that land, then there is no reservation of the land in the defendant's possession from sale, which would prevent the location of the land in question, under the certificate in favor of John Brooks or his legal representatives."

The deposition of Conway, one of the commissioners who confirmed this concession, was introduced to supply a defect in the record. He states that the original survey of Mackay, which Tillier claimed by, was before the commissioners, and no other plat, so far as he can remember. Now if this evidence was admissible, it was for the consideration of the jury. It was intended to correct the record, and show that the survey was acted upon by the commissioners, although no entry was made of it by the clerk in the tabular statement. It may well be doubted whether parol evidence was admissible for this purpose, especially after the lapse of some fourteen years. In a *matter involving title to real estate, parol evi- [*344
dence cannot be heard to correct the record which the commissioners were required to keep, of their proceedings.

As the evidence was heard, and does not appear to have been overruled or withdrawn from the jury, it was their province to act upon it. But by the instruction given, there was nothing left for the jury to decide. They were instructed that the claim of the plaintiff was reserved from location and sale when the New Madrid location was made, and consequently the latter was void. This ruled the whole case.

If the statement of Conway were not admissible, there was no evidence to show that any survey was before the commissioners at the time they confirmed the concession. And it is certain that no entry was made upon their record to show a sanction of any survey. It does appear that a survey of the concession was before the commissioners who rejected the claim in 1806. And it also appears that on the 9th of October, 1832, "a plat of survey dated 7th February, 1806, of 800

arpens, was before the new commissioners." But on the 2d of November, 1833, when the concession was confirmed, no survey appears to have been before them, and they refer to none.

If the two surveys made by Mackay of 800 arpens each, "for the proprietor," were admitted to have been made at the instance of Tillier, it leaves the location of the concession uncertain. Both surveys were executed on the same day, and were recorded on the same page. Under Tillier's right, he could survey only 800 arpens; and if he surveyed two tracts each of that quantity it was a fraud upon the public. Under the acts of Congress no tract of land was reserved as a Spanish claim, which was not surveyed or so specifically designated as to show with reasonable certainty its boundaries. There is nothing on the record or in the parol proof to show which of the plats, if either, was made as the instance of Tillier. Both surveys were made "for the proprietor," and as they bear the same date, it may be presumed they were made for the same person. But whether this be so or not, they present a state of uncertainty which is fatal to the Spanish claim. The mere name of Tillier, on one of the plats, without explanation, is no proof of its identity. An entry on the record to identify the survey would have been sufficient. In the absence of such evidence, the survey made or approved by Joseph C. Brown in 1842 does not supply the defect. He must have acted arbitrarily, or from circumstances which existed at the time he acted. There was nothing to guide him as to the true survey at the time the New Madrid location was made. And that was the *period of time to which the facts must apply, and the reservation of the Spanish claim be shown to have been made. The two surveys then existed and were on the record, and if neither were specially designated as Tillier's claim, there was no location of it within the reservation act. He could not claim both surveys, and as there was nothing on record to guide the New Madrid claimant in his location, he cannot be chargeable with notice.

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Under these circumstances, I think the court erred in its instruction to the jury, that the Spanish claim was reserved from sale, and that the New Madrid location was void. I think, for this error, the judgment should be reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Missouri, and was argued by counsel. On con-

sideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

ADAM L. MILLS, PLAINTIFF IN ERROR, *v.* SIMEON STODDARD, A CITIZEN OF INDIANA, CURTIS STODDARD AND DANIEL STODDARD, CITIZENS OF OHIO, JOSEPH BUNNELL AND LUCY BUNNELL, HIS WIFE, CITIZENS OF NEW YORK, JONAS FOSTER AND LAVINIA FOSTER, HIS WIFE, CITIZENS OF OHIO, LUCY HOXIE, A CITIZEN OF NEW YORK, DANIEL MORGAN AND ARVA MORGAN, HIS WIFE, CITIZENS OF NEW YORK, DEFENDANTS IN ERROR.

The decision of this court in the case of *Stoddard et al.* v. *Chambers* (2 How., 285) re-examined and confirmed.

The original petition to the Spanish Governor of Louisiana, upon which the concession was made, stated that he "came over to this side of the M. R. S. with the consent of your predecessors." These letters stand for *Majeste Rive Sud*, and refer to the Mississippi River.

The survey of the concession in 1806 fixed its locality. It is true that the survey was a private one, but it was adopted by the commissioners, who had authority to direct such surveys as they deemed necessary.

The holder of a New Madrid certificate had a right to locate it only on public lands the sale of which was authorized by law. But lands claimed under a Spanish concession, where the claim had been filed according to the acts of Congress, were reserved from sale when the entry under the New Madrid certificate was made, viz., in 1816. Consequently, the entry was void.

The patent for the land covered by the New Madrid certificate was not issued until after Congress had renewed this reservation, viz., in 1832. Therefore, neither the entry nor patent can give a good title.[1]

Had the patent been issued before Congress passed the act of 1832, the result would have been different.[2]

*THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Missouri. [*846

It was an ejectment brought in the Circuit Court by the defendants in error, as heirs of Amos Stoddard to recover 350 arpens of land, which is thus described in the declaration:—

"Being the same tract originally granted by the Spanish government, in the province of Upper Louisiana, to Mordecai Bell, by concession bearing date 29th January, 1800, and being the same tract located and surveyed by the proper officer on or about the first day of January, 1806, and which concession

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[1] DISTINGUISHED. *Mackay* v. *Eastley et al.*, 53 TEX., 451–454. FOLLOWED. *Delaurier* v. *Emison*, 18 How., 538.

[2] DISTINGUISHED. *Bryan* v. *Shirton*, 19 Wall., 632, 638.

and survey have been duly confirmed by the Congress of the United States to the said Mordecai Bell, or to his legal representatives, according to the said survey, and which tract is the same contained in the survey No. 3026, made by the authority of the United States, under and by virtue of the confirmation aforesaid, and is bounded on the east by the forty-arpen field lot, on the south by a tract called the Mill tract, and on the north and west by lands described as public lands on the survey made as aforesaid on the 1st of January, 1806."

The title of the heirs of Stoddard was particularly set forth in the report of the case of *Stoddard* v. *Chambers*, 2 How., 284, and it need not be repeated. Mills claimed under the same title as Chambers, both deriving their titles from two New Madrid certificates issued to Peltier and Coontz. It was admitted that, at the commencement of the suit, the defendant, Mills, was in possession of a portion of the tract comprehended in the survey of Mackay, made in January, 1806, for Amos Stoddard, being forty acres conveyed to said defendant on the 14th of March, 1836, by Hamilton R. Gamble and wife.

It was also admitted, that the property sued for was worth more than ten thousand dollars; that the plaintiffs claimed in this action four undivided fifths of the land described in the declaration; that the other undivided fifth had been conveyed to Hamilton R. Gamble in fee; and that the whole of the land sued for was embraced in the patent to Peltier.

Some testimony was given on the part of the defendant, with a view of impeaching the title of the plaintiffs, which was not produced in the trial of the cause of *Stoddard* v. *Chambers*, and which evidence it is proper to insert here.

Pascal L. Cerré, a witness for defendant, testified that he came to St. Louis very young from Canada, in the year 1777, returned to Canada, and came back to St. Louis in 1779, and remained there till 1781; that he then went to Canada, and staid there till 1787, when he came to St. Louis, where he
*347] remained till 1791, when he again visited Canada and staid *there till 1794, when he came to St. Louis, where he has remained ever since; that he was well acquainted with Mordecai Bell and his family, his father, mother, brothers, &c., and knew him when he first came to the Spanish country; that said Mordecai Bell resided at Wild Horse Creek, a few miles south of the post of St. Andre, where James Mackay was commandant in Spanish times; it was about two or two and a half miles south of that post where Mordecai Bell lived, and was about forty miles west south-west of St. Louis; that Mordecai Bell never resided at any time nearer St. Louis

than that place, nor did any other of the Bells; that Mordecai Bell lived at that place several years, and then went away; that said Bell was principally employed in hunting, drinking, and playing cards; he led a vagabond sort of a life; that he, Cerré, lived all the time at St. Louis, while Mordecai Bell was at Wild Horse Creek; that he, witness, knew the land occupied by Stokes; and that there was no improvement or cultivation there under Spanish government, nor, until Stokes cultivated it, was there any cultivation; said witness examined said original petition of Mordecai Bell, given in evidence by plaintiffs, and stated that he knew the handwriting of James Mackay well, and that it was, with the signature, except the mark, all in Mackay's handwriting; that he did not know why Stoddard's Mound was so called, but supposes it was because he purchased the land on which it was, and did not know when it was first so called, whether at Stoddard's death; he thinks it was before his death.

The defendant then offered in evidence the deposition of Mordecai Bell, which was objected to by the plaintiffs' counsel;—1st, because of irrelevancy; 2d, if not irrelevant, that it went to impeach a title conveyed by the witness;—which objection was overruled, and the deposition read, which is as follows:—

"Deposition of Mordecai Bell, produced, sworn, and examined at the house of said Bell, at Moreau township in the county of Morgan, and state of Missouri, before me, John Chism, judge of the County Court for the county of Morgan aforesaid, in a certain cause now pending in the Circuit Court of the United States for the District of Missouri, between Simeon Stoddard, Curtis Stoddard, Daniel Stoddard, Anthony Stoddard, William Stoddard, Joseph Bunnell and Lucy Bunnell, Jonas Foster and Lavinia Foster, Lucy Hoxie, Daniel Morgan, and Arva Morgan, plaintiffs, and Adam L. Mills, defendant, on the part of the defendant.

"Mordecai Bell, of lawful age, being produced, sworn, and *examined on the part of the defendant, deposeth and saith, that he resides in Moreau township, in the county of Morgan and state of Missouri; that he was first married on the 8th day of March, in the year 1802, and that parts of the three winters preceding his marriage, he was hunting in the upper part of this state; that neither in the year 1800, nor any year after, did he petition the Spanish Governor Delassus for any grant of land. That a few years after he was married, Santiago Mackay repeatedly asked deponent to petition the Spanish government for a grant of [*348

land: that some two or three years after Bequent was married, Mackay told him that he, Bequent, had a head right, and that he, Mackay, wished to change a tract of land for his head right which he, Bequent, did; that he never petitioned the Spanish Governor for any grant of land in or in the neighborhood of the town of St. Louis, nor was there any granted him to the best of his knowledge; that he resided in the counties of St. Louis and Franklin in the year 1819.

his
MORDECAI ✕ BELL."
mark.

Adolph Renard, for defendant, testified that he is a Frenchman, and the French language is his mother tongue; that he has been in the recorder of land titles' office since April, 1837, and more or less in habit of handling papers there, making copies and translations; and that the translation of the said original petition of Mordecai Bell—which translation is given in evidence by defendant—is a correct and faithful translation; that the letters "M. R. S." in said petition he considers as put for "Majeste Rive Sud;" that he, witness, knows nothing of the Spanish laws: that Julius De Mun was a good translator, and understood both French and English. He further stated that he never saw a concession where a commandant of a post recommended a grant of land lying close to St. Louis, the residence of the Lieutenant-Governor.

William Milburne, for defendant, testified that he had been in the surveyor's office from 1816 to 1841, a part of the time as clerk, and the latter part of the time as surveyor-general. He examined the said petition of Mordecai Bell, as translated by Renard, and the concession, and stated that he, as surveyor, should survey said concession on the south bank of the Missouri River, if not otherwise directed; that the post of St. Andre was in what is called Bonhomme Bottom, some thirty miles from St. Louis; that St. Andre was close on the river, and its site has been partially or wholly washed away by the river.

*349] *The plaintiffs, by way of rebutting testimony, gave in evidence the following letter of the Secretary of the Treasury of the United States, produced by Thomas Watson, register of the land office at St. Louis, from the files of his office, dated 10th June, 1818.

"*Treasury Department*, 10*th June*, 1818.

"SIR, You are requested to instruct the recorder of land titles in the Missouri territory to furnish to the receiver and register of the land district of St. Louis a descriptive list of

the land claims which have been presented and registered under the different acts of Congress for confirming the rights of individuals to lands which have not been confirmed, and that are situate within the said land district, with as little delay as practicable; also, a list of the same kind to the receiver and register of the district of Howard county, of all the land claims within said district which in like manner have not been confirmed. For this service he will be entitled to a reasonable compensation. 'You are also requested [to] direct the register and receiver of those districts, respectively, to withhold from sale all such lands, until otherwise directed.' It may be proper, however, to advise those officers that this act is not to be considered as in any manner countenancing the idea that such claims are considered equitable, or that their being withheld from sale at this time ought to excite an expectation that they will ultimately receive the sanction of Congress. They are withheld from sale because the land claims have been, during the latter end of the late session of Congress, referred to the Secretary of the Treasury, with directions to report to the next session. The receiver and register should be instructed to make the subject of these observations known, for the purpose of preventing speculation on those land claims.

"I have the honor to be your most obedient servant.

(Signed,) WM. H. CRAWFORD.

"JOSIAH MEIGS, ESQ., *C. G. L. O.*"

The plaintiffs likewise read in evidence the proclamation of the President of the United States, dated June, 1823, and published in the summer and fall of 1823, for the sale of the public lands, on the third Monday of November in that year, at St. Louis, which were situate in the township and range in which the land sued for in this action is situate.

The evidence being finished, the counsel for the defendant prayed the court to give the jury the following instructions:—

1. That the survey in 1806, made by Mackay, which has been given in evidence, was made without authority of law, *and is not evidence of the proper location of the [*850 order of survey made by the Lieutenant-Governor.

2. That if the jury find from the evidence, that the order of survey made by the Lieutenant-Governor in favor of Mordecai Bell would not embrace any part of the land in dispute, if surveyed according to its terms, then the land in dispute was never reserved from sale, and the patent to Eustache Peltier, or his legal representatives, passed the title to the land described in such patent.

3. The reservation by the act of Congress of 1811, in favor of those claiming under Mordecai Bell, if any such reservation existed, was of the land granted to said Bell, and not of the land surveyed by Mackay.

4. If the jury find, from the evidence, that the land sued for in this action is not a part of the tract of land conveyed by Mordecai Bell to James Mackay, in the deed of said Bell given in evidence, they will find for the defendant.

5. Unless the jury find from the evidence, that Mordecai Bell, or some person claiming under him, filed with the recorder of land titles a notice in writing stating the nature and extent of his claim, and that such notice embraced the land now in dispute, and was filed with the recorder on the first day of July, 1808, or prior thereto, then the land in dispute was not reserved from sale, and the patent to Eustache Peltier, or his legal representatives, conveyed the title to the land described in such patent.

6. That the instructions of the Secretary of the Treasury, read in evidence in this case, and the list of the recorder of land titles of the unconfirmed lands, do not affect any reservation of said land in dispute from sale against the title under the Peltier claim, as distinct from the reservation, if any there be, by act of Congress of March, 1811.

7. That there can be no recovery in this action, unless for land which was granted to Mordecai Bell.

8. If the jury find, from the evidence, that the New Madrid certificate, so called, in favor of Peltier, was located, embracing the land in controversy in this suit, and that in the year eighteen hundred and twenty-seven a patent certificate was issued by the recorder of land titles on such location, they will find for the defendant.

9. That no title to the land in question passed by the deed given in evidence of Mordecai Bell to James Mackay.

Which instructions, except the sixth, the court refused to give, and each of them; to which refusal the defendant, by his counsel, excepted. The court, then, of its own motion, gave the following instruction:—

*351] *The court rejected the instructions presented on the part of the defendant, numbered from one to nine, except the sixth, which was given, and instructed the jury, that the land included in the survey given in evidence, made for Amos Stoddard, on the 21st of January, 1806, by James Mackay, No. 42, was reserved from location and sale at the time Peltier's location was made, and also at the time his patent issued; and therefore both the location and patent are invalid, as against the title of Amos Stoddard, or those claim-

ing through him, to the extent that the two claims cover the same land. And that the land included in Mackay's survey aforesaid is the land confirmed to Amos Stoddard, or to his heirs, by the act of Congress of July 4th, 1836; and that the confirmation operated as a grant to said Stoddard, or, if he was dead, to his heirs, such being the legal effect of the acts of Congress, records, and title-deeds given in evidence; nor does the evidence of the witnesses introduced in any wise impair the effect of the acts of Congress and title papers.

To the giving of which last-mentioned instruction the defendant, by his counsel, excepted. The defendant then asked the following instructions:—

10. That there is no evidence before the jury that Mordecai Bell, or any person claiming under him, filed with the recorder of land titles such notice of claim according to law as was required in order that the land in question should be considered as reserved from sale.

11. That the plaintiffs are not entitled to recover in this action for any land embraced within the patent to Eustache Peltier, or his legal representatives, which has been given in evidence.

12. That there is no sufficient evidence that notice of the claim of Stoddard, under Mordecai Bell, was filed with the recorder of land titles on or before the 1st day of July, 1808, according to law.

13. If the jury find, from the evidence, that two of the plaintiffs, Anthony Stoddard and William Stoddard, conveyed their interest in the land in question to Henry G. Cotton since this action was brought, then the plaintiffs in this action are not entitled to recover any thing but damages down to the time of such conveyance, and the plaintiffs cannot recover damages for any time prior to the 4th day of July, 1836; and the jury are instructed to find specially the fact of such conveyance by said Anthony and William Stoddard, and its date.

Which the court refused to give, to which refusal the defendant, by his counsel, excepted. The defendant then asked the following instruction, which the court gave, viz.:—

*14. That the plaintiffs cannot recover damages for possession of the premises for any time prior to the 4th of July, 1836. [*352

And the said defendant prays the court to sign and seal this his bill of exceptions, which is done accordingly.

J. CATRON, [SEAL.]
R. W. WELLS. [SEAL.]

Under these instructions the jury found the following verdict:— 361

"We, the jury in the above-entitled cause, find the defendant guilty of the trespass and ejectment alleged in the declaration in the above-entitled cause, as to four fifths, less one sixth and one twelfth, of the following described piece of land, parcel of the land in said declaration described, to wit:—A certain tract or parcel of land, situate, lying, and being in the county of St. Louis, and bounded as follows, beginning at the southeast corner of the location, under a New Madrid certificate issued to Eustache Peltier, or his legal representatives, where the said corner is fixed upon the line of a tract, formerly the Mill tract of Auguste Chouteau, deceased; thence, with the southern line of said location, as the same runs westwardly, seven chains; thence, north fourteen degrees forty-five minutes east, to the Methodist burying-ground; thence, with the south line of the Methodist and Catholic burying-grounds, nine chains and sixty links, to the line of the common field lots; and thence, with the line of the common field lots (having in it an angle), to the place of beginning; being forty acres of land, and is bounded on the south by the land formerly of Auguste Chouteau, called the Mill tract; west by the land of John F. Darby; north by the Methodist and Catholic grave-yards; east by the common field lots of St. Louis. And we further find, that the damages suffered by said plaintiffs, by reason of said trespass and ejectment, to have been twelve hundred dollars. And we further find, that the monthly value of said four fifths, less one sixth and one twelfth, of said described premises, is thirty-one dollars and twenty-five cents."

Upon the above bill of exceptions, the case came up to this court.

It was argued by *Mr. Benton* and *Mr. Gamble*, for the plaintiff in error, and *Mr. Ewing*, for the defendants in error.

The points made by the counsel for the plaintiff in error were the following:—

1. That the Circuit Court erred in instructing the jury that
*853] the confirmation "to Mordecai Bell, or his legal representatives," *operated as a grant to Amos Stoddard, or, if he was dead, to his heirs.

The confirmation is in the alternative,—to Bell, or his legal representatives. Stoddard claimed as purchaser under Bell; the instruction, that the confirmation is a grant to Stoddard, involves the decision by the court of all the questions of law and fact arising upon the conveyances under which Stoddard claimed. *Wear and Hickman* v. *Bryant*, 5 Mo., 164.

2. Bell had no pretence of claim to the land in controversy at the period when the United States took possession of Louisiana, nor had Mackay or Stoddard any such claim prior to the survey in 1806.

3. The survey made by Mackay in 1806 did not, either by itself, or in connection with the concession, give any title to the land in controversy, because,—

1st. It was made, not only without authority of law, but contrary to express act of Congress. Act of 26th March, 1804 (2 Stat. at L., 287); *Smith's case*, 10 Pet., 326; *Wherry's case*, Id., 338; *Jourdan* v. *Barrett*, 4 How., 169; *Mackay* v. *Dillon*, Id., 448.

2d. It was a nullity, because a manifest departure from the concession. 8 Pet., 468; 9 Id., 171; 15 Id., 178.

4. The title now set up by the heirs of Stoddard, under a confirmation by the act of 4th July, 1836, cannot, by relation, overreach the patent to Peltier, issued in July, 1832. *Les Bois* v. *Bramell*, 4 How., 449; *Chouteau* v. *Eckhart*, 2 Id., 344; *Mackay* v. *Dillon*, 7 Mo., 12.

Unless the claimants under the confirmation can show that the Peltier patent is void, they have no shadow of right to maintain this action of ejectment. They attempt to avoid the patent by showing that the land was reserved from sale; and, consequently, from appropriation by a New Madrid claim, at the time when Peltier's location was made, and at the time when the patent issued. They insist, that, by the proviso to the tenth section of the act of 3d March, 1811, the land in controversy was reserved from sale, because their claim to it had been filed, "in due time and according to law," with the recorder of land titles; that this reservation was continued by the act of 17th February, 1818; and although it is admitted that, by the acts of 26th May, 1824, and 24th May, 1828, the reservation was terminated on the 26th of May, 1829, they insist that it was revived by the act of the 9th July, 1832, just seven days prior to the date of the Peltier patent.

It is necessary here to quote the words of the proviso in the act of 1811, upon which so much stress is laid. They [*354
are as *follows:—"That until after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been, in due time and according to law, presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana."

In this case the following points are made in relation to the alleged reservation. 23

1. That the proviso in question leaves to the officers, who are to act for the government in selling the public lands, the ascertainment of the facts,—1. That a particular tract has been claimed; 2. That the claim has been filed in due time; 3. That it has been filed according to law.

2. In this case it is insisted that there was no such notice of the nature and extent of the claim filed by the claimant, as was required by the acts of Congress. Acts of 2d March, 1805; 28th February, 1806; 3d March, 1807; *Strother* v. *Lucas*, 6 Pet., 763.

3. That the question whether the law was pursued by the claimant is not determined by the fact that the commissioners acted upon the claim, inasmuch as they acted upon claims illegally filed. *Bird* v. *Montgomery*, 6 Mo., 510.

4. The proviso reserved no land under a floating concession, it sanctioned no survey made in violation of any previous act of Congress; and the recording of a survey, illegally made, could have no effect whatever under this proviso.

The acts of Congress requiring the exhibition and recording of Spanish claims are analogous to registry acts. *Strother* v. *Lucas*, 12 Pet., 510. Recording a document, not required by law to be recorded, gives it no additional legal effect. 5 Shep. (Me.), 418; 23 Pick. (Mass.), 80; 3 A. K. Marsh. (Ky.), 220.

5. Where a claim to a tract of land had been filed and recorded according to law, the proviso only suspended the sale until the decision of Congress upon the report to be made by the commissioners; and this decision was made before the location of Peltier's warrant. See Acts of 13th June, 1812; 12th April, 1814; and 29th April, 1816.

6. The act of 17th February, 1818, did not revive any reservation that had terminated.

If it could be held that there was a reservation of this land from sale, and that such reservation continued to the time of Peltier's location, still it is insisted, that, as between the confirmation to Bell and the location and patent of Peltier, the location and patent are not void.

*355] *The reservation is admitted to have terminated on the 26th of May, 1829, and then Peltier's title was indisputably good.

1. The acts of the officers of the government appropriating the land had been performed. *Bagnell* v. *Broderick*, 13 Pet., 460; *Barry* v. *Gamble*, 3 How., 32.

2. The location of Peltier, thus appropriating the land, was not, as against the government, a mere nullity, but at the utmost was only defeasible by the confirmation of a conflict-

ing claim during the continuance of the reservation. *Stoddard* v. *Chambers*, 2 How., 284; *Carroll* v. *Stafford*, 3 Id., 460.

3. When the adverse claim under Mordecai Bell was, by the act of 26th May, 1824, entirely barred, and the land declared public land, so far as that claim was concerned, the title under the Peltier location became unquestionable, and no subsequent grantee of the land could dispute its validity. *Hoofnagle* v. *Anderson*, 7 Wheat., 212; *Stringer* v. *Young*, 3 Pet., 320; *City of New Orleans* v. *D'Armas*, 9 Id., 224.

The patent issued to Peltier is dated on the 16th of July, 1832, and it was under the laws of the United States the completion of the title. Unless this document is a nullity, the claimants under Bell cannot maintain their action.

It is insisted by them that the act of the 9th of July, 1832, revived the reservation which had terminated in 1829, and that, therefore, a patent could not legally be issued after the passage of that act for the land covered by their claim.

To this I reply, that the act of 9th July, 1832, did not make a reservation from its date, but from the time of the final report of the commissioners, which was long after the patent issued.

Lastly, it is claimed by the plaintiff in error that the effect of the second section of the act of 4th July, 1836, is to protect his title against the confirmation under the first section; and it is insisted,—

1. That this section is designed to protect locations and sales that would be subject to exception, and be liable to be defeated by the confirmations under the first section, but for the protection given by the second section. *Jackson* v. *Clark*, 1 Pet., 635.

2. That a location or sale, made in conformity to the acts of Congress, would have passed the title beyond controversy, as against a confirmation under this act, without the aid of the second section. *Chouteau* v. *Eckhart*, 2 How., 376; *Les Bois* v. *Bramell*, 4 Id., 449.

3. That the very defect supposed to exist in the locations and sales intended to be protected was, that the land was reserved from sale when the locations and sales were made.

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*Mr. *Ewing*, for defendants in error.

This is in effect the case of *Stoddard* v. *Chambers*, reported in 2 How., 284. The suit below was against another defendant residing on the same tract, and the evidence is substantially the same as in the reported case, to which, and to the authorities there cited, and the points of law decided by the court, I beg leave to refer.

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It was held in that case that the location "under any law," saved in the second section of the act of confirmation of July 4th, 1836, must be a location in conformity with it; and unless the location of the defendant shall have been made agreeably to law, or the patent were so issued, the reservation does not affect the title of the plaintiffs. (p. 317.) And that the location of the New Madrid warrant, being made on lands reserved from sale, was not authorized, but forbidden, by law. The saving was therefore held not to protect the claimant under the warrant. Against this decision I understand it will be urged,—

1st. That the court, to give the saving effect, and thus conform to the intent of the legislature, must apply it to this class of cases, there being no others, as it is said, to which it can apply.

This is a mistake in point of fact. From May 26th, 1829, to July 9th, 1832, there was no reservation of these lands from sale or location; and during part of this time the law allowed the location of New Madrid warrants. The saving would very properly apply to a location made during that time, which, without it, would not prevail against the confirmation, by law, of the elder title.

2d. That the opinion of the bar in Missouri was general in favor of the validity of New Madrid locations upon these reserved lands, and that in faith of such opinions many titles were acquired, which ought not to be disturbed.

This, also, is not correct in point of fact. Some of the ablest members of the bar, whose opinions I have seen, held these locations invalid. Indeed, there was a degree of boldness in the attempt to seize upon these lands by virtue of the New Madrid warrants, and a contempt of legal prohibition, which cannot fail to command our admiration. These New Madrid warrants were a charity; the law forbade their location on lands before they should be surveyed and offered for sale; and it again forbade their location on the lands claimed under Spanish concessions, until those claims should be finally adjusted. This location, with the rest that are in like jeopardy, *357] was made against this double prohibition. (See the letters of Mr. Wirt, *Attorney-General, to Mr. Crawford, of May 11, and June 19, 1820, Gilpin's Collection of Opinions, pp. 263 and 278.)

So far as the government itself was concerned, the wrong was submitted to, and a law was enacted, April 26, 1823, ch. 40, sanctioning locations which had been made before survey. But no law ever did the injustice to sanction these illegal locations on the property claimed under the concessions. Our

legislators were not at first familiar with the laws and policy of Spain, or her mode of making these grants; they were, therefore, long held open for consideration, and the laws sternly forbade the creation, under their authority, of other titles, which might put it out of the power of the government to do what at last might be found to be an act of justice, and a performance of treaty stipulation. This prohibition was distinctly understood, while these New Madrid titles were *in fieri*. See the opinion of Mr. Wirt, Attorney-General, October 10, 1825, (Opinions, &c., Vol. II., p. 25,) refers to letters of Mr. Crawford, June 10, 1818; Mr. Wirt, October 22, 1828; Mr. Butler, Attorney-General, August 8, 1838 (Opinions, &c., Vol. II., p. 1045).

The opinion that titles thus acquired were valid was, as far as I have been able to ascertain, confined to those who were engaged in their acquisition, and their counsel, and to such additional public opinion as interested parties were able to create.

But let the opinion be as extensive as it might, it can avail nothing in this court; it was contrary to plain law and right, and this is the place to correct it.

3d. It is said that an adherence to the decision in the case of *Stoddard* v. *Mills* will disturb many titles; that much property is held under these New Madrid locations, made upon Spanish concessions, which have been since confirmed, while they were thus reserved from location.

I know not how the fact is, as few such cases have come under my notice; but if it be so, it is entitled to no weight with this court. Whether there have been much or little property thus illegally taken, it ought all to be restored to its lawful owners. It was taken by those who knew, at the time, that their acts were illegal, and that they were attempting to seize what the law had reserved for others. They played for a stake, putting up a warrant worth but a trifle against a tract of land of great value. They have lost, and should be compelled to stand the hazard of the die.

4th. It is said, also, that the confirmation of these titles by the act of July 4, 1836, was a mere gift, and ought not to be considered favorably.

I contend, on the contrary, that it was an act of justice done *in execution of a treaty stipulation. Such [*358
is the ground on which it is put by the act of July 9th, 1832, and by the commissioners who examined these claims and recommended them for confirmation. Those who have become familiar with these concessions, and with the early value of such property, the state of the country, and the policy of Spain as to her colonies, are satisfied that *form* was

necessarily and habitually dispensed with; and that, if the United States had not acquired the sovereignty, the class of titles that were sanctioned by the law of confirmation would have become, or been made, valid by the existing government. It was thought, with reason, that independently of treaty stipulation, the inhabitants ought not to suffer in their property by the transfer of the sovereignty to the United States.

On the other hand, the New Madrid warrants were a mere charity.

The particular objections to be urged in this case, and which did not arise out of the evidence, in the case of *Stoddard* v. *Chambers*, I understand, are,—

1st. That certain depositions offered by plaintiffs below were improperly admitted.

The court, on the 4th day of April, 1844, established the following rule, which is still in force:—

"Ordered, that all exceptions to depositions, other than exceptions to the competency or relevancy of the evidence therein contained, shall be in writing, and filed, and notice thereof given a reasonable time before trial, and shall be taken up and disposed of before the jury are sworn in the cause, or the trial commenced; and no exceptions to depositions, other than to the competency or relevancy of the evidence therein contained, shall be allowed on the trial of the cause."

Depositions offered by the plaintiffs below, to prove heirship were objected to for informality in the taking, but admitted by the court under the above rule. The depositions were filed in court in the May term, 1840. They were not objected to on the former trial of the cause, nor until the 31st day of March, 1846, a few days before the cause was again called for trial, when the objections were noted, and notice given to the plaintiffs' counsel. The court held that this notice was not given a "reasonable time before trial," taking into view all the circumstances of the case.

The correctness of this decision seems to me self-evident. It was not "reasonable" to suffer those depositions to remain four years on file without objection, and then take exception
*359] to them for form merely, at such time as would compel a continuance *of the cause, to the great inconvenience of counsel and with expense to the parties, especially as nothing was to be gained by it except this inconvenience and expense.

2d. That the conveyance by two of the plaintiffs of their interest in the land, after action brought, bars the recovery in

ejectment as to all, and that the court erred in not so instructing the jury.

If this were an action of trespass in legal effect, as it is in form, the conveyance by the two plaintiffs would not disturb the case in the slightest degree. The sale of the land is not a release of the action; and if it were, the release must have been specially pleaded, *puis darrein continuance*, or it could not have been given in evidence.

But this action, wronged and mutilated as it is, is still ejectment, and the court will deal with it according to its substance, without regard to the form which it is constrained to assume.

In this action the courts have long done on the trial, and on motion, what, in other real actions, used to be done by summons and severance; that is to say, they have freed the case of parties who ceased to have an interest in its prosecution. This was done here by nonsuiting the plaintiffs who had sold their interest, and striking their names out of the declaration, and taking a verdict in behalf of the other plaintiffs for their remaining interest.

This practice is in strict analogy to that in the action of ejectment, where the nominal plaintiff counts on several demises from tenants in common; and the court on the trial, or even on motion in arrest of judgment, allow the demises of some of the lessors, who have shown no title on the trial, to be stricken from the declaration. *Van Ness* v. *Bank of United States*, 18 Pet., 17.

The court having directed that the names of two of the plaintiffs be stricken out of the declaration, it is not necessary to erase the record. *Lessee of Walden* v. *Craig's Heirs*, 14 Pet., 147. The direction stands for the act.

At common law, the summons and severance was resorted to in all real actions, where one of the parties plaintiff was for any reason unable or unwilling to proceed in the case.

"It lies in waste because the land is to be recovered." 20 Vin. Abr., 51. "It lies in right of ward of land." "In right of ward of body and land." "In detinue of charters, for peradventure he (the plaintiff) is to recover a warrantee by it." "So, generally, in actions real or mixed." 20 Vin., *ubi supra*. "It lies also in *quare impedit*, and a writ of error upon it." *Pipe* v. *Dominam Reginam*, Cro. Eliz., 325.

*In modern practice, the summons and severance is seldom used, but in cases where it has heretofore applied, the court proceed on motion. In the case at bar it would have been very idle to summon and sever, when the parties were all present by their counsel, and ready to sever by nonsuit. [*360

But, be the mode adopted to get clear of the parties who had sold their interest right or wrong, it was for them only, and not for defendants below, to complain of it. The defendants were not injured by any irregularity, if there was any. It would be a reproach upon the law to say, that there was no way in which this could be done; and no one, I think, can devise a better than that which was adopted by the court below. *Chouteau* v. *United States*, 9 Pet., 144, 153; *Hunter* v. *Hemphill*, 6 Mo., 119; *United States* v. *Percheman*, 7 Pet., 90, 91.

To the objection, that the location was a departure from the concession, I answer,—

1st. That it is immaterial if it were so; for, the location having been made, the survey filed with the claim became a part of it. Altogether, it was the claim; and whether good or bad, it was not for a stranger, but for the United States, to determine. This land, then, was claimed; and being so, was reserved from sale by the act of 1811. Finally, the Board of Commissioners, and Congress acting on their report, determined that the land ought to be held according to the survey.

2d. But the location was in pursuance of the concession. The translation of De Mun conveys the true meaning of the petition; that of Renard does not, though it may translate each French word literally into an equivalent English word. Their disagreement is in the translation and explanation of the clause in which Bell represents, "que avec l'agrement de votre predecesseur il se transporter sur cette *rive*, où il a choisi une morceau de terre," &c.

De Mun, a contemporary, resident at the time in Louisiana, translates and explains the passage thus:—"That, with the consent of your predecessor, he came over to this *side* (of the Mississippi), where he selected a piece of land," &c.

Renard translates it, "That he, with the consent of your predecessor, has come over to this *shore*, where he has selected a tract of land," &c.; and by the context, as expounded by counsel, makes it the "shore" of the Missouri, and not of the Mississippi, to which he has come with this assent.

That it was the Mississippi, and not the Missouri, which he crossed with the assent of the Lieutenant-Governor, is certain. The Mississippi bounded the Spanish territory on the east, but the Missouri was entirely within it; he might cross the Missouri at pleasure, without such assent,—not the Missis-

*361] sippi.

*Again, why say, "il se transporter sur *cette rive* où il a choisi," &c., "*rive sud du Missouri?*" Why "*cette rive*" and "*rive sud*," with the addition of *Missouri* in the same

sentence, if both meant the same thing, or if *Missouri* were understood in the first branch of the sentence? But it is very clear from the text itself that they meant different things. De Mun's knowledge of the boundary of Louisiana, and the laws touching immigration, enabled him to explain that difference. "*Cette rive*" means *this side* of the Mississippi. It may be north or south of the Missouri, for his Majesty had domains on both sides of that river; but "R. S. du Missouri," (*rive sud*,) defines the side north or south of that river, on which he prays for a concession. But neither "*cette rive*" nor "*rive sud*" means *shore*, in its most restricted sense,—the water's edge, or the river-bank. Its whole sense, text, and context show, that it was to *this side* of the Missis sippi which he had come, not confining himself to the water's edge; and it was on the *south side* of the Missouri, in an equally large sense, as contradistinguished from the north, that he asked permission to locate the warrant which he prays for.

Indeed, the very fact that initials are used (M. R. S.) shows that the expression occurred frequently, and De Mun, a contemporary, gives its conventional meaning.

Mr. Justice McLEAN delivered the opinion of the court.

The plaintiffs brought an action of ejectment in the Circuit Court, to recover three hundred and fifty arpens of land in the neighborhood of St. Louis, which they claim under a concession made by the Spanish government, in 1800, to Mordecai Bell. Bell conveyed his right to James Mackay on the 20th of May, 1804, and on the 20th of September, 1805, Mackay conveyed the same to Amos Stoddard, the ancestor of the plaintiffs. A plat and certificate of the survey were certified and recorded by Antoine Soulard, as Surveyor-General, the 20th of January, 1806.

On the 29th of June, 1808, the above papers were filed with the recorder of land titles for the district of St. Louis. The claim was duly presented to the Board of Commissioners, under the acts of Congress, and rejected on the 10th of October, 1811; but afterwards, on the 8th of June, 1835, a new board decided that three hundred and fifty arpens of land "ought to be confirmed to the said Mordecai Bell, or his legal representatives, according to the survey on record." On the 4th of July, 1836, an act of Congress was passed, confirming the decision of the commissioners. The land was surveyed as confirmed. The *defendant admitted that he *[362 was in possession of forty acres of the land claimed at the commencement of the suit.

The title of the defendant was founded on an entry made by Peltier of one hundred and sixty acres of land, by virtue of a New Madrid certificate, on the 24th of October, 1816 A survey of the entry was made in March, 1818, and a patent to Peltier was issued on the 16th of July, 1832. Possession has been held of the forty acres claimed by the defendant, and by those under whom he claims, since 1819. This title was conveyed to the defendant.

The township in which this land is situated was surveyed by the United States in 1817, 1818, and 1819, and was examined in 1822. In 1823, the proclamation of the President, published at St. Louis, directed the lands in the above township to be offered at public sale.

This title, with but little variation of facts, was asserted by the plaintiffs, and duly considered by this court, in the case of *Stoddard's Heirs* v. *Chambers*, 2 How., 284. And the court held the title to be valid against that which is now set up by the defendant. In the case of *Barry* v. *Gamble*, 3 How., 53, that decision was sanctioned. But the counsel for the defendant, having brought the same title before us in this case, have requested a re-examination of the points ruled in the case of *Chambers*. We will briefly refer to the points now made, and to the new facts proved, on which this application is founded.

The court instructed the jury, "that the land included in the survey given in evidence, made for Amos Stoddard on the 21st of January, 1806, by James Mackay, No. 42, was reserved from location and sale at the time Peltier's location was made, and also at the time his patent issued; and, therefore, both the location and patent are invalid, as against the title of Amos Stoddard, or those claiming through him, to the extent that the two claims cover the same land. And that the land included in Mackay's survey aforesaid is the land confirmed to Amos Stoddard, or to his heirs, by the act of Congress of July 4th, 1836," &c.

It is objected that the concession granted to Mordecai Bell should have been located at St. Andre, and not in the vicinity of St. Louis. In his petition to the Lieutenant-Governor of Upper Louisiana, he states, "with the consent of your predecessor, he came over to this side [of the Mississippi], where he has selected a piece of land in his Majesty's domain, on the south side of the Missouri. This being considered, he supplicates you to have the goodness to grant him, at the same place, *368] for the support of his family, three hundred and fifty arpens *of land in superficie." This bears date 21st January, 1800; and on the 29th of the same month the

Lieutenant-Governor responds,—"In consequence of the information of the commandant of St. Andre, Don Santiago Mackay, I do grant to the petitioner the tract of land of three hundred and fifty arpens in superficie," &c., "in the place indicated."

St. Andre, the place of Bell's residence, is situated on the south side of the Missouri River, about thirty miles from St. Louis. Pascal L. Cerré, a witness, states that Bell resided in the neighborhood of St. Andre several years, and was engaged in hunting, drinking, and playing cards, and led a sort of vagabond life; that his petition, except the mark of the signature of Bell, was in the handwriting of Mackay. And Bell, being sworn as a witness, says he never applied for a concession, nor was there, to his knowledge, any grant made to him. That Mackay told him he had a head right which he, Mackay, wished to obtain, and which the witness exchanged with him for a tract of land near St. Andre.

Instead of the word "(Mississippi)," included in brackets in the petition of Bell, it seems the letters M. R. S. were used, which one of the witnesses considers "as put for Majeste Rive Sud;" and Milburn, a surveyor, says, that he should have surveyed the concession on the south bank of the Missouri River, if not otherwise directed. In opposition to this view, the words of the petitioner are relied on, "that with the consent of your predecessor, he came over to this side of the M. R. S.," which could only have meant the Mississippi River, that river being the eastern limit of Louisiana, which extended far north of the Missouri. That to cross the Missouri River, the "leave of his predecessor" could not have been asked, as it was unnecessary.

Whatever doubts this evidence may have created, as to the location of Bell's concession, had it been laid before the commissioners who acted upon the claim, it is now too late to affect the title under it. In regard to the statement of Bell, his conveyance of the land in controversy to Mackay shows, at least, the inaccuracy of his memory. But the survey of the concession in 1806, as now claimed, which survey was recorded and expressly confirmed by the commissioners on the 8th of June, 1835, is a sufficient answer to the above objection. The survey was a private one, and consequently was of no authority except to designate the locality and extent of the claim, until sanctioned by the commissioners. By the act of the 21st of April, 1806, they were authorized to direct such surveys as they may think necessary for the purpose of deciding on claims presented for their decision; and under this power they had a *right to adopt private surveys [*364

of claims, if accurately executed. This was in pursuance of the instructions of the Secretary of the Treasury.

The great question in the case is, whether the land in controversy was subject to be appropriated by a New Madrid warrant on the 26th of October, 1833, when Peltier made his location.

Under various acts of Congress up to the 26th of May, 1829, Spanish or French titles which had been duly filed by the recorder of land titles were reserved from sale. These acts are referred to in the case of *Stoddard* v. *Chambers*. At that period all claims which had not received the sanction of the government were barred. On the 4th of July, 1832, an act was passed "for the final adjustment of land titles in Missouri," which provided that the recorder of land titles, with two commissioners to be appointed, should examine all the unconfirmed claims to land in Missouri which had heretofore been filed in the office of the said recorder, according to law, founded upon any French or Spanish grant, &c., issued prior to the 10th of March, 1804." And they were required to class the claims so as to "state in the first class what claims, in their opinion, should in fact have been confirmed, according to the laws, usages, and customs of the Spanish government, and the practice of the Spanish authorities under them; and secondly, what claims, in their opinion, are destitute of merit, law, or equity." And after the report, the lands in the first class shall continue to be reserved from sale as heretofore, until the decision of Congress shall be made against them; but the second class was declared to be subject to sale as other public lands.

This act reserved from sale, necessarily, all claims which had been duly filed, until the final report of the commissioners; and those which were embraced in the first class, until Congress should reject them. In the case of *Stoddard* v. *Chambers*, the court say, in reference to Peltier's location,—"It was made on land not liable to be thus appropriated, but which was expressly reserved; and this was the case when the patent was issued. Had the entry been made, or the patent been issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested. But at no other interval of time, from the location of Bell until its confirmation in 1836, was the land claimed by him liable to be appropriated in satisfaction of a New Madrid warrant."

The defendants' counsel suppose, that, if the location of the
*865] New Madrid claim was void, the patent, though issued within *the time above stated, could have conveyed no

title. The New Madrid location was void because it interfered with the Spanish title. When that title was barred by the lapse of time, the government, by issuing of a patent, would have sanctioned the New Madrid claim, and no one could have contested it,—as between the government and the claimant no controversy could exist. By the patent, he only acquired what his certificate entitled him to. And the right, thus made complete, could not have been affected by any subsequent act of Congress. The government might have withheld the patent, on the ground that the New Madrid certificate had been improperly located; but that not being done, the patent gave an indisputable title.

It is insisted that the New Madrid location, if made on lands reserved from sale by reason of the Spanish claim, became valid, so soon as the bar was complete against that claim. But this consequence would not seem to follow. If, during the bar, no act was done by the government to confirm the New Madrid claim, nor by the claimant to perfect his title, a removal of the bar would not prejudice any newly acquired right. And this only could prevent the renewal of the reservation by Congress. By such a renewal, a preference was given to the Spanish claim, which was an exercise of legislative discretion. Congress might have excepted from this reservation lands covered by New Madrid locations; but this not having been done, the Spanish claim is revived, and placed on the same footing as before the bar.

It is insisted, that, as Bell's concession was surveyed without authority, it was no notice to Peltier, though recorded. The act of 1806, as before remarked, authorized the commissioners to direct such surveys as they may think necessary to be executed, for the purpose of deciding on claims presented for their decision; but where a private survey had been made, they had the power to adopt it, as was done in this case. And such survey, being placed upon record by the recorder, seems to have been a reasonable notice, within the acts of Congress.

But it is contended, that the proviso in the act of 1836, which confirmed the Spanish and French claims reported by the commissioners, embraces Peltier's New Madrid location. The words of the proviso are, "that if it should be found that any tract confirmed, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed or sold by the United States, that act should confer no title on such lands, in opposition to the rights acquired by such location or purchase."

*In the case of *Stoddard* v. *Chambers*, this court held, that "a location under the law of the United States" [*366

must be "in conformity with it." But this, it is insisted, is not the true construction of the proviso. That "under the law" does not mean, "in pursuance of it," or "in conformity with it," but an act assumed to be done under it.

The word *under* has a great variety of meanings. But the sense in which it was used in the proviso is, "subject to the law." We are under the laws of the United States, that is, we are subject to those laws. We live under a certain jurisdiction, that is, we are subject to it. The proviso declares, that the act shall not confer a title, "in opposition to the rights acquired under the laws of the United States." This would seem to be conclusive, as no right can be acquired under a law which is not in pursuance of it. If the New Madrid location was made in violation of the law, it is not perceived how any right could be acquired under it.

The judgment of the Circuit Court is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Missouri, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

EDMUND B. CALDWELL, SURVIVING PARTNER OF JAMES LYND, JR., AND COMPANY, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.

In this case, the court below instructed the jury, that if the goods were fraudulently entered, it was no matter in whose possession they were when seized, or whether the United States had made an election between the penalties, and that the forfeiture took place when the fraud, if any, was committed, and the seller of the goods could convey no title to the purchaser.

This instruction was right in respect to the sixty-eighth section of the act of 1799 (1 Stat. at L., 677), as the penalty is the forfeiture of the goods *without an alternative of their value*, but wrong as the instruction applies to the sixty-sixth section of the same act,—as the forfeiture under it is either the goods *or their value*.

Under the sixty-eighth section, the forfeiture is the statutory transfer of right to the goods at *the time* the offence is committed. The title of the United States to the goods forfeited is not consummated until after judicial condemnation, but the *right to them* relates backwards to the time the offence was committed, so as to avoid all intermediate sales of them between the commission of the offence and condemnation.[1]

[1] CITED. *The Kate Heron.* 6 Sawy., 110.

But under the sixty-sixth section of the act, in which the forfeiture is the goods *or their value*, the United States have no title in the goods, until an election has been *made either to recover the goods or their value.

Therefore, under that section, any rights in the goods acquired *bonâ fide* by third persons in the meantime are protected.[2]

The claimants prayed the court to instruct the jury, that the United States were not entitled to recover under the first and second counts of the information founded on the fiftieth section, unless the goods were unladen and delivered without permits. The jury was told, in reply,—"If the permits were obtained by fraud and improper means, they were of no effect, and a mere nullity. The United States are entitled to recover, if the goods were imported with the view to defraud the revenues." Whether or not the permits were obtained by fraud or improper means was a point in the cause for the jury to decide, and what the court said upon the prayer was virtually saying to the jury, that a verdict might be returned upon the first and second counts against the claimants, and that they were liable to the penalties of the act for unlading goods without a permit, without saying if they thought that there was evidence enough to prove the fact against them.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case was this.

In August, 1839, the attorney of the United States filed an information in the District Court of the United States for the Eastern District of Pennsylvania, against thirty-five remnants of pieces of cloths and cassimere, that had been seized at the store of James Lynd, Jr., & Co.

The information contained thirteen counts.

1. Charged, That the goods were brought from a foreign port into some port or place in the United States, to the attorney of the United States yet unknown, and were unladen and delivered from the vessel in which they had been brought, without any permit or special license from the collector or naval officer or any other competent officer of the customs. Act of 1799, § 50 (1 Stat. at L., 665).

2. Charged, That the goods were brought into the port of New York, and there unladen and delivered without a permit. Act of 1799, § 50 (Id.).

3. That the said goods were found concealed in a certain store in the occupation of William Blackburne & Co., at the port of Philadelphia, the duties on said goods not having been paid or secured to be paid. Act of 1799, § 68 (1 Stat. at L., 677.)

4. That the said goods were, on their importation, entered at the office of the collector of New York; and that on each and every of the entries, an invoice of the goods included in

[2] APPLIED. *Six Hundred tons of Iron ore*, 9 Fed. Rep., 600. FOLLOWED. *United States* v. *Four cases of Castings*, 10 Ben., 373. CITED. *United States* v. *York Street Flax Spinning Co.*, 17 Blatchf., 139.

the entry was produced and left with the collector. That the said goods were not invoiced according to the actual cost thereof at the place of exportation, but were invoiced at a less sum than the actual cost, with design to evade the duties thereupon, or some part thereof. Act of 1799, § 66 (1 Stat. at L., 677).

*368] *5. That entries of the said goods, at the time of their importation, were made at the office of the collector of New York; and that on each of the entries an invoice of the goods, &c., was produced and left with the said collector. That all and each of the said invoices so produced, and all and each of the several packages, in each and every of the said invoices in which the said goods were imported, were made up with intent, by a false valuation, to evade and defraud the revenue of the United States. Act of 1830 (4 Stat. at L., 410.)

6. That entries of the said goods, at the time of their importation, were made at the office of the collector of New York; that on each of the entries an invoice of the goods was produced and left with the collector; that all and each of the said invoices were made up with intent, by a false valuation, to evade and defraud the revenue of the United States. Act of 1830, § 4 (4 Stat. at L., 410).

7. That all and each of the several packages contained in each and every of the entries, and each and every of the invoices so produced, were made up with intent, by a false valuation, to evade and defraud the revenue. Act of 1830, § 4 (4 Stat. at L., 410).

8. Charges that the invoices were made up by a false extension, to evade and defraud the revenue of the United States. Act of 1830 (4 Stat. at L., 410).

9. That the goods, &c., being composed wholly or in part of wool or cotton, were entered, at the times of their importation, at the office of the Collector of New York; that invoices were produced and left with the collector; that all and each of the packages in each and every of the invoices, and each and every of the entries, were made up with intent to evade and defraud the revenue of the United States. Act of 1832 (4 Stat. at L., 593).

10. As amended, the same with the 4th.

11. As amended, the same with the 6th.

12. As amended, the same with the 7th.

13. As amended, the same with the 9th.

To this information the claimants put in three pleas:—

1st. Traversing the several causes of forfeiture alleged.

2d. The second plea, which was to all the counts save the

two first, alleged that claimants, prior to goods being seized, had *bona fide* purchased the goods for full value, without any notice or knowledge of their being liable to seizure or forfeiture, under or by an act of Congress, entitled "An act to regulate the collection of duties on imports and tonnage," from persons having the ostensible ownership of them, and that at the *time of seizure the goods were in no [*369 way whatever concealed, within the meaning of any act of Congress.

3d. The third plea alleged that the goods, prior to their seizure, had been duly entered, passed through the custom-house, &c., the duties imposed paid, and the goods thereupon delivered to the importers; that afterwards the several packages, of which these goods formed part, were broken up and divided; that subsequently these goods were at sundry times purchased *bona fide*, and for full value, from persons having the ostensible ownership of same, and without notice or knowledge that they were liable to seizure or forfeiture under any act of Congress for any cause; that no part of the goods had been imported or entered by the claimants; that at the time of seizure they were not in original packages, nor concealed, but openly exposed for sale on the shelves of claimants' store.

To the first of these the United States joined issue.

To the second and third demurred generally, and claimants joined in demurrer.

These two pleas denying every cause of forfeiture except the single one of the goods having been falsely invoiced, it is believed that all the material questions afterwards arising on the trial of the cause are raised by these demurrers; but for greater caution, the same points were again raised on the trial, in the shape of exceptions to the judge's charge and otherwise.

On the trial it appeared that James Lynd, Jr. & Co. kept a wholesale and retail dry goods store in Philadelphia, and were in the habit of purchasing goods from W. Blackburne & Co. and John Taylor, Jr.; that at the time of the seizure, the officer inquired for and took from them at their store, all the goods which had been purchased from Blackburne & Co., or from John Taylor, Jr.; and that the goods seized were at the time distributed among other goods in single pieces and parts of pieces, on the shelves of claimants' store, for sale, without any appearance of concealment whatever. Evidence was, under objections, offered to show that part of the goods seized corresponded in numbers with pieces forming parts of various invoices that had been in 1838 and 1839 fraudulently entered

by Blackburne and Taylor, at prices below their value in England, whence they had been exported.

There was no evidence of any other cause of forfeiture whatever.

For the purpose of fixing the fraud, evidence was likewise given, under similar objections, of other fraudulent invoices made about the same time by Blackburne and Taylor, and likewise of conversations with Blackburne some days before the *seizure, about other invoices and other goods, and the concealment of said other goods from the officers.

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There was no attempt to show that the claimants had any part in this concealment, nor in the making of the false entries; but, on the contrary, it appeared that the goods had been fairly and *bonâ fide* purchased and settled for before the seizure.

The claimants contended, that where goods are imported, entered at the custom-house, duties imposed and paid according to such entry, and a permit and license thereupon granted, under which the goods are delivered to the importer, the original packages subsequently broken, and part of them sold to a *bonâ fide* purchaser without notice, and before the United States had made any election, the goods so sold are not liable to seizure in the hands of such *bonâ fide* holder, though they may have been fraudulently entered by being invoiced below their actual cost, &c.

The attorney of the United States contended, on the contrary, that, from the moment the fraudulent entry was made, the goods became forfeited, and the title of the United States accrued so as to defeat the right of a subsequent *bonâ fide* purchaser without notice, and that when the goods are delivered under a permit obtained under such fraudulent entry, it is as though no permit had been given, and the goods had been delivered without permit.

The counsel for the claimants asked the court to instruct the jury,—

First. That there cannot be a forfeiture of the goods under the fourth section of the act of 1830, nor under the fourteenth section of the act of 1832, unless the information alleges, and the United States have proved, all the special circumstances of the examination and detection of the fraud, under the authority of the collector, in the manner pointed out in said acts of Congress.

On which the court instructed the jury,—This is correct; but there may be a forfeiture under the act of 1799.

Second. That the probable cause mentioned in the seventy-first section of the act of Congress of 1799, chapter 22, refers

to the right of seizure under said act; and the right of seizure depends on the fact, whether, at the time of their being seized, the goods were concealed within the meaning of the sixty-eighth section of said act.

On which the court instructed the jury,—This is not law as applied to this case. The probable cause applies to all cases of seizure for any fraud under any of the revenue laws, and any section of any such law. Whether there was probable *cause for the prosecution does not depend upon whether there was originally ground for the seizure or not, but upon the proof at the trial in support of the prosecution. [*371

Third. That the term *concealed*, in said sixty-eighth section, applies only to articles intended to be secreted and withdrawn from public view, on account of the duties not having been paid, or secured to be paid, or from some other fraudulent motive; which the court answered affirmatively.

Fourth. That if the goods were not so concealed, nor any probable cause to suspect their concealment at the time of their seizure, the burden of proof is upon the United States; that neither the existence of probable cause to suspect that goods, upon which the duties had not been paid, or secured to be paid, were in possession of the claimants, nor the fact that goods were found in their possession which had been fraudulently invoiced or entered, is sufficient to justify a seizure under said sixty-eighth section, unless the goods were concealed by them, or they were parties or privies to the false invoices or entries.

On which the court instructed the jury,—This is not the law. The burden of proof is not upon the United States, though the goods may not have been concealed, nor any probable cause to suspect their concealment at the time of their seizure, if there was probable cause to believe the duties upon them had not been paid or secured.

Fifth. That if the goods seized had been fairly and *bonâ fide* purchased by the claimants, without any knowledge by them of their being liable to seizure on the part of the United States, and were, at the time of the seizure, openly exposed by them for sale in their store, the United States cannot recover under the sixty-sixth or sixty-eighth section of said act of 1799, even though the goods had been fraudulently or falsely invoiced or entered, provided the claimants were in no way parties thereto.

On which the court instructed the jury,—This is not the law. If the goods were fraudulently entered, it is no matter in whose possession they were when seized; the forfeiture

took place when the fraud, if any, was committed, and the seller could convey no title to the purchaser.

Sixth. That even though the goods in question had been invoiced at less than actual cost thereof at the place of exportation, with design to evade the duties thereupon, the United States had no title in the goods until they made their election, either to recover the goods themselves, or the value thereof; and that any rights in said goods acquired *bonâ fide* by third *372] *persons in the meantime are protected against the right of forfeiture under this section.

On which the court instructed the jury,—This is not the law. The title of the United States vested at the time the fraud, if any, was committed, and the law authorized them to seize the goods wherever they might be found.

Seventh. That the United States are not entitled to recover under the first and second counts of the information, unless the goods were unladen, and delivered without permits.

On which the court charged,—If the permits were obtained by fraud and improper means, they are of no effect, and a mere nullity. The United States are entitled to recover, if the goods were imported with the view to defraud the revenue.

Eighth. That the burden of proof in this case, under the seventy-first section of the act of 1799, is upon the United States.

On which the court charged,—This is not so; the burden of proof is on the claimants.

The counsel for claimants also asked the court to charge,—

Ninth. That the claimants are not bound to prove the innocence of intent of the importers in making the invoices.

Tenth. The claimants are not bound to prove the actual cost or value of the goods at the place of exportation.

Eleventh. The claimants are not bound to prove innocence of intent of the importers in making their invoices, nor the actual cost at the place of exportation when they were appraised at the custom-house.

Twelfth. That the permits, and the delivery of these goods from the custom-house, is a bar in all cases against any forfeitures, except where the claimants are parties or privies to the fraud in obtaining them, or had knowledge of the same.

Thirteenth. If the vendor is liable to the claimants of the goods seized for indemnity for the forfeiture of them, the seizure does not invalidate the sale, or impair the title of claimants thereto.

But the court refused so to charge the jury, and further charged,—

That the United States have shown probable cause for this

prosecution, and the claimants are bound to prove the innocence of intent of the importers in making the invoices. That they are bound to prove the actual cost or value of the goods at the place of exportation, even though they were appraised at the custom-house. That the granting permits, and delivery of these goods from the custom-house, is not a legal bar against forfeiture in all cases, except where the claimants are parties or *privies to the fraud in obtaining them, or had knowledge of the same. And, as to the thirteenth point, that if the goods were fraudulently entered, no title passed to the claimants. [*373

And thereupon the counsel for the said claimants did then and there except to the aforesaid charge and opinion of the court.

Under these instructions of the court, the jury found a verdict for the United States, under the act of 1799, ch. 22, §§ 50 and 66, as to all the goods contained in the libel, except two pieces of cloths, as to which they found for the claimants. The judgment of the District Court followed the finding of the jury.

Upon the exceptions above stated, the case went up to the Circuit Court, which, on the 9th of November, 1846, affirmed the judgment of the District Court, and a writ of error brought the case up to this court.

It was argued by *Mr. Fallon*, for the plaintiff in error, and by *Mr. Johnson* (Attorney-General), for the United States.

Mr. Fallon, for the plaintiff in error, made the following points:—

1. That the court below erred in not giving judgment in their favor on the demurrers.

2. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that if the goods were not, within the meaning of the sixty-eighth section of the act of 1799, concealed, nor any probable cause to suspect their concealment at the time of their seizure, the burden of proof is upon the United States; that neither the existence of probable cause to suspect that goods, upon which the duties had not been paid, or secured to be paid, were in the possession of the claimants, nor the fact that goods were found in their possession which had been fraudulently invoiced or entered, are sufficient to justify a seizure under said sixty-eighth section, unless the goods were concealed by them, or they were parties or privies to the false invoices or entries; and in charging, on the contrary, that this is not the law; the burden of proof is

not upon the United States, though the goods may not have been concealed, nor any probable cause to suspect their concealment at the time of their seizure, if there was probable cause to believe the duties upon them had not been paid or secured.

3. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that if the goods seized had been fairly and *bonâ fide* purchased by the claimants, without any knowledge by them of their being liable to seizure on the
*374] part of the United States, and were, at the time of the seizure, *openly exposed by them for sale in their store, the United States cannot recover under the sixty-sixth or sixty-eighth section of said act of 1799, even though the goods had been fraudulently or falsely invoiced or entered, provided the claimants were in no way parties thereto; and in charging, on the contrary, that this is not the law, and that if the goods were fraudulently entered, it was no matter in whose possession they were when seized; the forfeiture took place when the fraud, if any, was committed, and the seller could convey no title to the purchaser.

4. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that even though the goods in question had been invoiced at less than actual cost thereof at the place of exportation, with design to evade the duties thereupon, the United States had no title in the goods until they made their election either to recover the goods themselves or the value thereof; and that any rights in said goods acquired *bonâ fide* by third persons in the meantime are protected against the right of forfeiture under this section; and in charging, on the contrary, that this is not the law, and that the title of the United States vested at the time the fraud, if any, was committed, and the law authorized them to seize the goods wherever they might be found.

5. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that the United States are not entitled to recover under the first and second counts of the information, unless the goods were unladen and delivered without permits; and in charging, on the contrary, that if the permits were obtained by fraud and improper means, they are of no effect, and a mere nullity, and that the United States were entitled to recover, if the goods were imported with a view to defraud the revenue.

6. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that the burden of proof in this case, under the seventy-first section of the act of 1799, i

upon the United States; and in charging, on the contrary, that the burden of proof was on the claimants.

7. That the learned judge erred in not instructing the jury, as requested by claimants' counsel, that the claimants were not bound to prove the innocence of intent of the importers in making the invoices; that the claimants were not bound to prove the actual cost or value of the goods at the place of exportation; that the claimants were not bound to prove innocence of intent of the importers in making their invoices, nor the actual cost at the place of exportation when they were appraised at *the custom-house; that the permits, and the delivery of the goods at the custom-house is a bar in all cases against forfeitures, except where the claimants are parties or privies to the fraud in obtaining them, or had a knowledge of the same, and that if the vendor is liable to the claimants of the goods seized for indemnity for the forfeiture of them, the seizure does not invalidate the sale, or impair the title of claimants thereto. [*375

8. That the learned judge erred in charging the jury, that the United States have shown probable cause for this prosecution, and the claimants are bound to prove the innocence of intent of the importers in making the invoices. That they are bound to prove the actual cost or value of the goods at the place of exportation, even though they were appraised at the custom-house.

9. That the learned judge erred in charging the jury, that the granting permits and delivery of these goods from the custom-house is not a legal bar against forfeiture in all cases, except where the claimants are parties or privies to the fraud in obtaining them, or had knowledge of the same.

10. That the learned judge erred in charging the jury, that, as to the thirteenth point, if the goods were fraudulently entered, no title passed to the claimants.

11. The plaintiff in error further submits, that the case of *Wood* v. *United States*, 16 Pet., 342, in no way rules the present case; that the claimant in that case was the same person who had made the false entry, he having entered them on his own oath as goods of which he was the actual owner. (See page 346.) It is therefore submitted, that the language of the court there applies only to a case where the party making the false entry is himself the claimant, and not to a case like the present, where the goods are claimed by a *bonâ fide* purchaser without notice. (See 16 Pet., 361–365.)

12. That the learned judge erred in admitting in evidence the acts and declarations of John Taylor, Jr., and Wm. Blackburne & Co., tending to show fraud in the entry or conceal-

ment of other goods than those in the invoices of which the goods in question formed part.

In support of these points *Mr. Fallon* made the following observations.

It is contended that, at common law, forfeitures have no relation back to time of the offence (except in cases of suicide, &c.) See 4 Bl. Com., 421; Co. Litt., 390 *b*, 391 *a*; also authorities collected by Mr. Justice Story, in *United States* v. 1960 *Bags of Coffee*, 8 Cranch, 405, 408, 411, 412; and *376] by *Judge Winchester, in *United States* v. *Grundy*, 3 Cranch, 356, 363, in note. And though it may be admitted that Congress may so provide, that the title shall, by reason of the forfeiture, relate so as to vest from the time of the offence committed, such is not the provision of the law under consideration.

The sixty-sixth section of the act of 1799, (1 Stat. at L., 677,) on which alone this case can be sustained, provides, that, in case of a false invoice of goods, with design to evade the duties thereon, "such goods, or the value thereof, to be recovered of the person making entry, shall be forfeited," showing that it was intended that government should make an election to take either goods or value from the person making entry. They certainly could not take both, and their right to either being precisely equal, neither becomes vested in them till election made. See opinion of the court, construing the fourth section of the act of 1792, (1 Stat. at L., 289,) containing words precisely alike, "the ship or its value, to be recovered of the person making the oath, shall be forfeited." This right of election, it was held by the court, negatived the argument that Congress intended that the title should vest from time of offence committed, and protected a *bonâ fide* purchaser, who bought before election made. In this respect, this case is distinguished from the cases of *United States* v. 1960 *Bags of Coffee*, 8 Cranch, 396, where, in the absence of words giving a right of election, from the fifth section of the act of 1809, (2 Stat. at L., 520,) the title was held to vest from time of offence committed. See p. 398, Id. To the same effect is *Gelston* v. *Hoyt*, 3 Wheat., 311. In confirmation of these views, the court is referred to the 68th section of the act of 1799, (1 Stat. at L., 678,) which imposes heavy penalties on parties to pretended sales; a precaution hardly necessary, if it were not that a *bonâ fide* sale without notice would defeat the recovery by the United States.

It is submitted, that the language of the court in *Wood* v. *United States*, 16 Pet., 365, where it is held that the forfeiture accrues upon making the false invoice, in no way conflicts

with the present argument. In that case the claimant was the very party who had made the false entry, see p. 342, (and indeed had been tried for perjury, see 14 Pet.,) and the argument made by him was, that, the moment the goods passed the custom-house, the goods were safe; the action of the officers of the government in passing the goods was, it was argued, equivalent to a judgment mantling the successful fraud, and that case refused only to the bungling deceiver the protection of *res adjudicata*. It was in reference to such a case that the language *in question was used; [*877 but it is submitted that, even then, the opinion of the court is perfectly reconcilable with the present argument. All that the court decided was, that the "forfeiture," that is, the penalty or right to recover, accrued at once on commission of the offence; but whether that forfeiture should be of "the goods, or of the value thereof," must depend upon the exercise of their right of election, and until that right be exercised, intervening rights are protected.

Also, it is submitted that the fiftieth section of the act of 1799, (1 Stat. at L., 655,) was meant to provide against cases of smuggling in goods at places other than ports of entry, or without passing the custom-house, &c. Such was not this case. There was no evidence, or pretence whatever, of fraud in obtaining the permits. The fraud was in making the false entries or invoices, and frauds of that character are specially provided for by the subsequent sections of the act. It is therefore contended, that, under the evidence, and so far as respects this case, the learned judge erred in charging that, if the permits were obtained by fraud, they are of no effect.

A contrary construction of the act from what is now contended for induced the court erroneously, as is submitted, to permit evidence to be given of frauds on the revenue, committed by the original importers in other importations and in other ways, thus treating the claimant as a *particeps criminum*. It may be admitted that, in cases of conspiracy, fraud, &c., the *quo animo* may be shown by evidence of similar frauds committed by the same parties about the same time. But this rule has never been extended farther. To oblige an innocent purchaser to defend his vendor, or perhaps his more remote vendor, from every imputation of fraud that may be brought against him, though unconnected with the goods bought by him, and of which he could have had no knowledge, would be to impose a hardship so intolerable as to be revolting to every sense of justice; and yet perhaps it is the necessary consequence of the construction now complained of.

On the part of the United States, *Mr. Johnson* (Attorney-General) made the following points:

1. That probable cause was shown for the prosecution, so as to throw the *onus probandi* of innocence on the claimant. *Wood* v. *United States*, 16 Pet., 342; *Taylor* v. *Blackburn*, 3 How., 197; *Buckley* v. *United States*, 4 Id., 251; *Clifton* v. *United States*, Id., 242.

2. That the acts and declarations of John Taylor, Jr., and William Blackburne & Co., showing fraud in the entries, *invoices, and concealment of other goods than the goods in question, were evidence as tending to show fraud in the entries, invoices, and concealment of the latter goods. Same authorities above cited.

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3. That the goods not being invoiced, at the time of their entry, at the actual cost at the place of exportation, but below the said cost, and with the design to evade the duties thereon, the same were at once forfeited to the United States; not only as against the fraudulent importer, but as against a purchaser without notice from such importer. Same authorities as are cited under the first point, and *United States* v. 1960 *Bags of Coffee*, 8 Cranch, 398; *Roberts* v. *Witherhead*, 5 Mod., 193; 12 Mod., 92; 1 Salk., 223; *Lockyer* v. *Offley*, 1 T. R., 252; *Wilkins* v. *Despard*, 5 T. R., 112.

4. That the United States were entitled to recover under the first and second counts of the information, although the goods were unladen and delivered with permits, if these permits were obtained by fraud and improper means; and that they were entitled to recover if the goods were imported with a view to defraud the revenue. *Bottomley* v. *United States*, 1 Story, 146.

5. That the instructions asked below, by the claimant, as to the construction of the fourth section of the act of 1830, and the fourteenth of that of 1832, and the proof which the United States should offer to bring the present case within these sections, were erroneous; but if not, the judge below was right in saying, that, independent of these acts, the United States were entitled to recover under the act of 1799. The same authorities as are cited under the first point.

6. That, admitting that a purchaser for value and without notice could not be affected by a forfeiture under the sixty-sixth section of the act of 1799, yet the judgment below being on the first, second, and fourth counts, is correct, because the first plea of the claimant does not profess to answer the first and second counts; and the second plea, which is to all the counts, is no answer to the first and second counts, and being bad in part, is bad altogether. 7 Cranch, 339; 16 Pet., 357

4 How., 250; 1 Chit. Pl., 546; *Biggs* v. *Cox*, 7 Dowl. & Ry., 410.

Mr. Justice WAYNE delivered the opinion of the court.

We shall direct the reversal of the judgment of the Circuit Court in this case, on account of three erroneous instructions which were given to the jury. The prayers upon which those instructions were given are the fifth, sixth, and seventh.

*They involve the question, as to the time when the right of forfeiture attaches upon the entry of goods [*379 invoiced at less than their value at the place of exportation, under a statute which declares in such a case, that either the goods, or the value of them, shall be forfeited.

The instructions were given by the learned judge in the court below upon the supposition that they were required by the decision which this court made in *Wood's case*, 16 Pet., 342, particularly upon account of a sentence in the opinion at the three hundred and sixty-fifth page of the volume.

It was supposed to be a repetition in that case of what had been adjudged by the court, in the cases of *The United States* v. 1960 *Bags of Coffee*, and in *The Brigantine Mars*, 8 Cranch, 398, 417. Or that those cases did not permit instructions to be given to the jury as they were asked by the counsel for the claimants, and did permit the court to give the following:—That the title of the United States vested in the goods entered upon an undervalued invoice, at the time the fraud was committed, and the law authorized the United States to seize the goods wherever they might be found.

Neither of the cases mentioned authorizes such a conclusion. There is a sentence in *Wood's case*, from which it may be made, unless it is carefully considered in connection with the last of the paragraph and with the first part of the next. That sentence is,—"But under the sixty-sixth section no such allegations would be necessary or proper, as the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced, without any reference whatever to the mode or the circumstances under or by which it was ascertained."

The sixty-sixth section of the act to regulate the collection of duties upon imports and tonnage, (1 Stat. at L., 677,) is, "that if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares, and merchandise, or

the value thereof, to be recovered from the person making the entry, shall be forfeited."

It cannot be correctly said, when the declaration of forfeiture is disjunctively one or the other, of either the goods or their value, that the forfeiture upon the fraudulent entry necessarily and compulsively comprehends the first, to the exclusion of the value of the goods, which is also said may be a forfeiture—that is, that the goods are forfeited with a *880] right in the government to assert a forfeiture of the value too, where the penalty *for the fraud committed can only be one of them, and not both; or that when this court said in *Wood's case*, speaking of the sixty-sixth section, that "forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced," it was not intended to embrace either or both penalties, between which the United States might make its election for the punishment of the fraud.

That such is the meaning of the sentence already cited from *Wood's case* is shown by the court's recognition, in the next, of the alternative forfeiture of the value of the goods, to be recovered of the person making the false entry; and, also, by the use it makes of it, to show that the sixty-sixth section had not been repealed, because no such provision exists in the acts of 1830 or 1832, and no subsequent act covers all the cases provided for by it. The point in discussion in that part of the opinion was, whether the sixty-sixth section of the act of 1799, ch. 22, had been repealed, or whether it was in full force. The court, arguing against the repeal, used the alternative forfeiture in it of the value of the goods, and the want of the same in other acts, to show that it was still in full force; in that way satisfactorily establishing that the words, "the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced," apply to the entry; not to make the goods a vested forfeiture in the United States, but to show that the right in the United States to either forfeiture is co-existent with the commission of the fraud.

But if the explanation given of that part of *Wood's case* shall not be as satisfactory to others as it is to ourselves, though we think it will be so to all persons, we then say, that the point there in discussion, concerning the sixty-sixth section, is altogether different from that which we are here considering under the same section; and that any declaration concerning it used argumentatively, only to show a difference between it and other statutes in a point of pleading, as is the fact in that part of the opinion, cannot be an applicable authority, much less controlling, when the inquiry under the

same statute is its meaning in respect to the attachment of penalties in it for its violation.

In *Wood's case*, the point in discussion is, that the United States are not entitled to recover under the third count in that information, because the sixty-sixth section of the act of Congress, passed the 2d of March, 1799, entitled "an act to regulate the collection of duties on imports, &c.," was not in force when the goods mentioned in the count were imported.

The point we are now considering, arising under the same section is, Are goods entered upon an invoice [*381 not according to the value thereof at the place of exportation, with design to evade the duties thereon or any part thereof, *eo instanti* upon the false entry a forfeiture to the United States, so as to avoid an intermediate sale of them to a *bonâ fide* purchaser, or one altogether ignorant of the fraud, and in no way connected with the perpetrator of it, except in buying the goods from him for a fair price? The claimants in this case contended, in the trial in the Circuit Court, that neither under the sixty-sixth nor the sixty-eighth section were the goods, *eo instanti* upon the commission of the fraud, forfeited to the United States, "if the goods seized had been fairly and *bonâ fide* purchased by them, without any knowledge by them of their being liable to seizure, and were, at the time of the seizure, openly exposed by them for sale in their stores, though the goods had been fraudulently or falsely invoiced or entered, provided the claimants were in no way parties thereto." And, "that though the goods in question had been invoiced at less than actual cost of them at the place of exportation, with design to evade the duties thereon, the United States had no title in the goods until they made their election, either to recover the goods themselves, or the value thereof. And that any rights in said goods acquired *bonâ fide* by third persons in the meantime are protected against the right of forfeiture under the sixty-sixth section.

The claimants asked that such instructions should be given by the court to the jury. The court refused, but did instruct the jury, "that if the goods were fraudulently entered, it is no matter in whose possession they were when seized, or whether the United States had made an election between the penalties; and that the forfeiture took place when the fraud, if any, was committed, and the seller of the goods could convey no title to the purchaser." This instruction is partly right and partly wrong; right in respect to the sixty-eighth section, as the penalty is the forfeiture of the goods without an alternative of their value; wrong as the instruction applies

to the sixty-sixth section, the forfeiture under it being either the goods or their value.

In the first, the forfeiture is, the statutory transfer of right to the goods at the time the offence is committed. If this was not so, the transgressor, against whom, of course, the penalty is directed, would often escape punishment, and triumph in the cleverness of his contrivance by which he has violated the law. The title of the United States to the goods forfeited is not consummated until after judicial condemnation; but *the right to them* relates backwards to the time the offence was committed, *so as to avoid all intermediate sales of them between the commission of the offence and condemnation.

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So this court said in the case of *United States* v. 1960 *Bags of Coffee*, 8 Cranch, 398. It was said again, in the case of *The United States* v. *Brigantine Mars*, 8 Cranch, 417. Declared again four years afterwards, in *Gelston* v. *Hoyt*, 8 Wheat., 311, in these words:—"The forfeiture must be deemed to attach at the moment the offence is committed," so as to avoid all sales afterwards.

The differences in time when the transfer of right in forfeited goods takes place, under such provisions for forfeiture as are found in the sixty-sixth and sixty-eighth sections of the act of 1799, were fully considered and ruled by this court in *United States* v. *Grundy and Thornburg*, 3 Cranch, 337. It was afterwards noticed and assented to by the Attorney-General of the United States, in his argument in the case of the 1960 *Bags of Coffee*, 8 Cranch, 398; and has always been considered, from the time it was made, as the proper interpretation of a statute providing for a forfeiture for an offence, either of goods *or their value*. No case can be found in our own or the English courts in conflict with it.

We must therefore say, that the instructions given upon the fifth and sixth prayers of the claimants were erroneous.

Our conclusion, also, is, that there was error in the instruction given by the court upon the seventh prayer of the claimants. The prayer is, "that the United States are not entitled to recover, under the *first and second counts* of the information, unless the goods were unladen and delivered without permits." The difference between the first and second counts is, that the allegation in the first is, that the goods were brought into some port or place in the United States *unknown*, unladen and delivered; and in the second, that they were brought into the *port of New York*, and unladen and delivered there; and in both, without any permit or special license from the collector or any other competent officer of the customs.

The response of the court to the prayer is,—"If the permits were obtained by fraud and improper means, they were of no effect, and a mere nullity. The United States are entitled to recover, if the goods were imported with the view to defraud the revenue."

The direct and proper response to that prayer ought to have been, that, as the first and second counts were framed upon the fiftieth section of the act of 1799, by which a fine is imposed upon persons unlading and delivering goods without a permit, if the jury should find that the goods in question had been *so unladen by the claimants, then they [*383 were liable to the penalty provided in that section; or if the goods were unladen by them with a permit, the jury could not find a verdict against the claimants upon the first and second counts.[1]

The prayer does not involve, either in terms or inferentially from them, the legal effect or sufficiency of a permit obtained by improper means, or fraud upon the unlading of goods under it; or that the permit under which the goods in question may have been landed had been fraudulently obtained, and the goods landed under it by the claimants. When, then, the jury were told, that a permit obtained by fraud or improper means was of no effect and a nullity, it was virtually saying to them, that a verdict might be returned upon the first and second counts against the claimants, and that they were liable to the penalties of the act for unlading goods without a permit, without saying, if they thought that there was evidence enough to prove the fact against them. And the court, by adding, that "the United States are entitled to recover, if *the goods were imported with the view to defraud the revenue*," stated a proposition out of the case; for there was no such count in the information, or any statute of the United States, for the punishment of frauds in the importation of goods, upon which a count could have been framed in the words of the instruction. The instruction was calculated to mislead the jury into a conclusion, that the suit was against the claim-

[1] Where no statute interferes, the court has the power to modify the instructions asked in accordance with what it deems the law to be. *Castle* v. *Bullard*, 23 How., 172, 190; *Pleak* v. *Chambers*, 7 B. Mon. (Ky.), 565, 569; *Horton* v. *Williams*, 21 Minn., 187, 192; *Dodge* v. *Rogers*, 9 Id., 223; even though pertinent and relevant to the case, the court may yet change the form of them. *Pitts* v. *Whitman*, 2 Story, 609, 620; and in case the judge answers points submitted to him by counsel (as in Pennsylvania), the rule is the same. *Patterson* v. *Kountz*, 63 Pa. St., 46; *Groft* v. *Weakland*, 34 Id., 304; *Deaken* v. *Temple*, 41 Id., 234. But after giving the instruction as asked, the judge should not weaken it by language of his own, thus leaving the jury in doubt. *Horton* v. *Williams*, 21 Minn., 187.

ants for a meditated fraud in the importation of the goods in question, which had rendered them liable to be forfeited.

It is not necessary to notice the other prayers asked, refused, and given in this case. It was argued before this court only upon the three already stated, the answers to which we have said are erroneous.

We shall, therefore, remand the cause, with an order for the reversal of the judgment, and for a *venire de novo*, that further proceedings may be had thereon in conformity with this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court affirming the judgment of the District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with
*384] directions to enter a disaffirmance of the judgment of the District *Court, and to remand this cause to the said District Court, with directions to that court to award a *venire facias de novo*, and for further proceedings to be had therein in conformity to the opinion of this court.

EDMUND T. H. GIBSON, PLAINTIFF IN ERROR, *v.* BRADFORD B. STEVENS, DEFENDANT.

Where personal property is, from its character or situation at the time of the sale, incapable of actual delivery, the delivery of the bill of sale, or other evidence of title, is sufficient to transfer the property and possession to the vendee.[1]

Where articles of commerce were purchased in the state of Indiana, and the vendors, in whose warehouses they were lying, gave a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal-boats soon after the opening of canal navigation, these documents transferred the property and the possession of the articles to the purchasers.

These documents, being indorsed and delivered to a merchant in New York, in consideration of advances of money in the usual course of trade, transferred to him the legal title and constructive possession of the property.[2]

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[1] CITED. *Hatch* v. *Oil Co.*, 10 Otto, 128; *Leonard* v. *Davis*, 1 Black, 483; *Merchants' &c. Bank* v. *Hibbard*, 48 Mich., 123. S. P. *Trieber* v. *Andrews*, 31 Ark., 163; *Re Batchelder*, 2 Low., 245; *Schoonmaker* v. *Vervalen*, 9 Hun (N. Y.), 138.

[2] DISTINGUISHED. *Adams* v. *Merchants' Nat. Bank*, 9 Biss., 400. FOLLOWED. *Hoyt* v. *Hartford Fire Ins.*

Therefore, an attachment subsequently issued, at the instance of a creditor of the original purchasers, which was levied upon the property in question, could not be maintained.[8]

This court will judicially recognize this branch of trade. It has existed long enough to assume a regular form of dealing, and its ordinary course and usages are now publicly known and understood.

The New York merchant stood in the position of an actual purchaser to the extent of his advances, and not in that of a factor who had made advances upon goods in his possession.

A guarantee by the first sellers that the articles should pass inspection did not change the original sale into an executory contract. It was nothing more than the usual warranty of the soundness of the goods sold.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Indiana.

It was an action of replevin brought by Gibson, a citizen of New York, against Stevens, the sheriff of Allen county, Indiana, who had in his custody sundry articles of property which he had taken by virtue of a writ of foreign attachment, issued under the state laws of Indiana.

The facts in the case were agreed upon by the counsel in the Circuit Court as follows.

Be it remembered, that at the May term of said court, A. D. 1844, the above cause was submitted to the decision of the court, without the intervention of a jury, upon the following agreed facts, to wit:—

The parties mutually agree that the following are the facts in this case:—That McQueen & McKay, citizens of the city of Detroit, state of Michigan, about the 20th of March, [*385
1844, *by false pretences, fraudulently procured the branch of the State Bank of Indiana, at Indianapolis, to loan to them the sum of about eleven thousand dollars. The money thus loaned consisted of notes of the Indianapolis branch of said State Bank of Indiana, payable to bearer, and transferable by delivery. With part of the money thus obtained, McQueen & McKay purchased of Hanna, Hamilton & Co. three hundred and fifty barrels of mess pork, for the sum of $2,908.50, and at the same time paid to the said Hanna, Hamilton & Co. the said purchase-money; and thereupon the said Hanna, Hamilton & Co. executed and delivered to the said McQueen & McKay the memorandum of said purchase, receipt, and guarantee thereto appended; which are herewith filed and marked A, and made a part of this agreement, and are in the words and figures following, to wit:—

Co., 26 Hun (N. Y.), 418. CITED. *The Thames*, 14 Wall., 106; *Forbes* v. *Boston &c. R. R. Co.*, 133 Mass., 156; *Stewart et al.* v. *Ins. Co.*, 9 Lea (Tenn.), 109.

[8] FOLLOWED. *Halliday* v. *Hamilton*, 11 Wall., 585. CITED. *Adous* v. *Seeligson & Co.*, 54 Tex., 600, 608. S. P. *Wheeler* v. *Sumner*, 4 Mason, 183; *The Sarah Ann*, 2 Sumn., 207; *United States* v. *Delaware Ins. Co.*, 4 Wash. C. C., 418.

ants for a meditated fraud in the importation of the goods in question, which had rendered them liable to be forfeited.

It is not necessary to notice the other prayers asked, refused, and given in this case. It was argued before this court only upon the three already stated, the answers to which we have said are erroneous.

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EDMUND T. H. GIBSON, PLAINTIFF IN ERROR, *v.* BE B. STEVENS, DEFENDANT.

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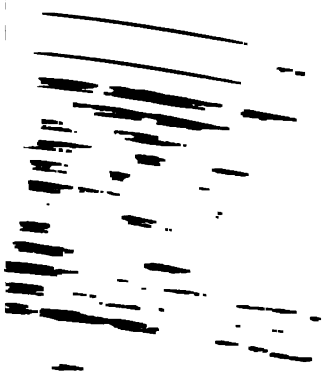

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"*Fort Wayne, April* 4, 1844.

"Messrs. McQueen & McKay,

"Bought of Hanna, Hamilton & Co.

"350 barrels mess pork, to be delivered on board of canal-boats soon after the opening of canal navigation, at $8.31 . . . . . $2,908 50

"Received payment in full,

"HANNA, HAMILTON & Co.

"We guarantee the inspection of the above pork at Toledo, and the delivery on board of canal-boats at this place soon after the opening of canal navigation.

"HANNA, HAMILTON & Co.

"*Fort Wayne, April* 4, 1844."

The said barrels of pork were, at time of said sale to McQueen & McKay, lying in the warehouse of said Hanna, Hamilton & Co., in the town of Fort Wayne, in the state of Indiana, about twenty feet from the Wabash & Erie Canal, marked and branded "Mess Pork," together with a large number of other barrels of pork, marked and branded "Prime Pork," and "Clear Pork."

Said three hundred and fifty barrels being all the mess pork in said warehouse at that time, or at any other time since, and all the barrels marked "Mess Pork," but were not seen by McQueen & McKay. Said barrels of prime, clear, and mess pork laid in said warehouse promiscuously, and so remained up to, and at, the time of the assignment of said writing marked A; but after the assignment, and before the levying the attachment hereinafter mentioned, said Hanna, Hamilton *386] & Co. had *shipped off all of the said barrels of pork marked and branded "Prime Pork" and "Clear Pork."

Said McQueen & McKay, at the same time, purchased of D. & J. A. F. Nichols, of Fort Wayne, Indiana, two hundred barrels of superfine flour, for the sum of $712.50, and at the same time paid the said D. & J. A. F. Nichols the said purchase-money; and thereupon said D. & J. A. F. Nichols executed and delivered to said McQueen & McKay a memorandum of said purchase, receipt, and guarantee, in the words and figures following, to wit:—

"*Fort Wayne, April 4th*, 1844.

"Messrs. McQueen & McKay,

"Bought of D. & J. A. F. Nichols.

"Two hundred barrels of superfine flour, at $3.56¼, $712 50

"Received, Fort Wayne, April 4th, 1844, payment in full.

896 "D. & J. A. F. NICHOLS.

"Received the above flour in store, at Fort Wayne, April 4th, 1844, which we agree to deliver on board of canal-boats here, soon after the opening of the navigation, subject to the order of McQueen & McKay.

"D. & J. A. F. NICHOLS.

"We guarantee the inspection of the above flour in New York as superfine flour.

"D. & J. A. F. NICHOLS."

Which are herewith filed and marked B, and are part of this agreement. Said barrels of flour were, at the time of said sale, lying in the warehouse of said D. & J. A. F. Nichols, in the town of Fort Wayne, Indiana, on the bank of the Wabash and Erie Canal, and there remained until they were seized and taken under the attachment hereinafter mentioned. Said purchases were both made in the town of Fort Wayne, in the county of Allen, in the said state of Indiana, on the 4th day of April, 1844.

On the 17th day of April, 1844, said McQueen & McKay presented the said memorandums of purchase, receipts, and guarantees thereto appended, as above set forth, and marked A and B, to the said Gibson, in the city of New York, and requested of said Gibson an advancement upon the flour and pork therein mentioned; whereupon the said Gibson did advance to the said McQueen & McKay, on the faith of said flour and pork, and the evidences of title thereto, the sum of $2,787.50, and took from said McQueen & McKay an assignment of said *memorandums of purchase, receipts, and [*387
guarantees, respectively, indorsed on the back of each in the words and figures following, to wit:—

"Deliver the within two hundred barrels of flour to E. T. H. Gibson, or order.

"MCQUEEN & MCKAY."

"*New York, April* 17, 1844.

"Deliver the within 350 barrels of pork to E. T. H. Gibson, or order.

"MCQUEEN & MCKAY."

Which are also part of this agreement.

Said McQueen & McKay, at the same time, delivered to the said Gibson the original memorandums of purchase, receipts, and guarantees above set forth, and marked A and B; in whose possession they now remain.

At the same time McQueen & McKay wrote, signed, and delivered to said Gibson, the letter which is herewith filed,

marked C, and made a part of this agreement; and is in the words and figures following, to wit:—

"*New York*, 17*th April*, 1844.

"MESSRS. LUDLOW & BABCOCK, *Toledo*:—

"Gentlemen,—We have this day received an advance from E. T. H. Gibson, Esq., on the following lots of pork, which you will have the goodness to deliver to his order, and to comply with his instructions relative to the shipment, to wit:—

365 bbls. mess pork, } from warehouse of Walker, Roger & Co.
225 do. prime do. }
11 do. mess do. from warehouse of Benbridge & Mix.
300 do. do. do. do. do. Hamilton & Williams.
350 do. do. do. do. do. Hanna, Hamilton & Co.
200 do. flour, from warehouse of D. & J. A. F. Nichols.

"Respectfully, Gentlemen, your obedient servants.

"MCQUEEN & MCKAY."

On the 18th day of April, 1844, Gibson inclosed the letter above referred to in another letter written by himself, directed to Mott & Co., at Toledo, Ohio, and mailed the same on the said 18th day of April, 1844, in the post-office in the city of New York; which said letter, with the inclosure, said Mott & Co. received by due course of mail, and handed said inclosed letter, as requested by said Gibson, to Ludlow & Babcock, at Toledo, Ohio.

*388] Said Gibson also, on the said 18th day of April, 1844, *mailed, in the post-office in the city of New York, a letter written by himself, and directed to said Ludlow & Babcock, at Toledo, Ohio, which said Ludlow & Babcock received by due course of mail; which letter is herewith filed, marked D, and made a part of this agreement; and is in the words and figures following, to wit:—

"*New York*, *April* 17, 1844.

"MESSRS. LUDLOW & BABCOCK, *Toledo, Ohio*:—

"Gentlemen,—I have this day made McQueen & McKay, of Detroit, an advance on twelve hundred and fifty-one barrels of pork, and two hundred barrels of flour, which is stored at different points on the line of the Wabash Canal, and which they state is to be shipped to your care, and held by you at Toledo, until you receive instructions from them respecting it. They have given me an order on you for it, which I have sent to Mott & Co. I wish you to ship the pork and flour to me immediately on its arrival at Toledo, at the lowest possible

rates of freight, and send me a bill of lading of the same. There is one lot of three hundred barrels of pork in Hamilton & Williams's warehouse, on which there is due from McQueen & McKay, on its arrival at your place, $550.00. This amount you may draw on me for, so soon as I receive bill of lading of the pork. Let me hear from you by return mail respecting it.

"I remain truly and respectfully yours.

"E. T. H. GIBSON."

At the time of the assignment of said memorandums of purchases, receipts, and guarantees, said Gibson was a commission merchant in said city of New York, in the state of New York, and it was usual and customary for commission merchants, residing and doing business in the city of New York, to make advances on Western produce, upon the assignment of the proper evidences of title thereto.

On the 23d of April, 1844, said Gibson, having on that day learned that McQueen & McKay had suffered some of their bills to be protested for non-payment, despatched one William Hoyt to the town of Fort Wayne, aforesaid, to see to the shipping of said pork and flour; and the said Hoyt arrived at said town of Fort Wayne on the 29th day of April, 1844, for that purpose, having in his possession the said writings marked A and B.

At the time of the assignment of said writings marked A and B, the said Wabash and Erie Canal was navigable at and from the said town of Fort Wayne to the said town of Toledo.

On the 27th day of April, 1844, a writ of attachment [*389
issued *from the Allen Circuit Court, in the state of Indiana, in due form of law, at the instance and in the name of the State Bank of Indiana, against the goods and chattels, lands and tenements, of the said McQueen & McKay (William McQueen and James McKay); which said writ of attachment, and all the proceedings in and about the issuing of the same, are admitted to have been regular; and the production of the same, and of the record thereof, is hereby waived.

This said writ was directed to the defendant in this suit, who then was, and still is, sheriff of said county of Allen, and came to his possession as such sheriff on the said 27th day of April, 1844; on which said 27th day of April, 1844, the sheriff aforesaid, by virtue of said writ of attachment, levied upon, seized, and took into his possession the said pork and flour described in said writings, marked A and B, the return day of which said writ has not yet elapsed. And it is also agreed, that the proceedings of the said sheriff in executing the writ of attachment were, in all respects, regular. (It is not, how-

ever, admitted by the plaintiff, that the property levied on was, at the time levied on, or at any time since, the property of the said McQueen & McKay, or that McQueen & McKay had an attachable interest therein.) And that the defendant shall have the full benefit of all the proceedings in the said attachment, in the same manner as though the record thereof was produced before this court. And it is further agreed, that the said sheriff kept and retained the possession of the said flour and pork, so levied on by said writ of attachment, until the same was replevied out of his possession, by virtue of the writ of replevin in this case. The said writ of attachment was issued and sued out for the purpose of coercing the payment of the said money, obtained by the said McQueen & McKay, as above stated.

It is further admitted by the parties, that the said pork and flour are of the value mentioned in the affidavit of William Hoyt, now on file in this court, on which said writ of replevin was issued.

The said Ludlow & Babcock were, on the 17th day of April, 1844, the forwarding merchants of the said McQueen & McKay, at Toledo, Ohio, one hundred and four miles from Fort Wayne; and that Mott & Co. were, on the same day, the forwarding merchants of said Gibson at same place, Toledo.

It was understood between the said Gibson and the said McQueen & McKay, at the time of said assignment of said writings marked A and B, that the said Gibson should sell the said pork and flour, and after retaining his said advancement
*390] and his legal commission, and interest and outlays, pay the remainder of the *proceeds of said pork and flour to said McQueen & McKay according to the usage and custom of commission merchants. The pork and flour mentioned in said writings, marked A and B, and that levied upon by virtue of said attachment, and that replevied by virtue of said writ of replevin, in this cause issued, and purchased by McQueen & McKay with the money obtained from said bank, as aforesaid, are the same pork and flour, and not other or different. The said levy, seizure, or detention of said pork and flour happened at and within the county of Allen, in the state of Indiana; a legal demand was made before the commencement of this suit, and after the said levy, upon the defendant, by said Hoyt, as the agent of said Gibson, for the said pork and flour, and the said defendant refused to surrender the same. The said Gibson was, at the time of the commencement of this suit, and still is, a citizen of the state of New York, and the defendant a citizen of the state of Indiana.

The said advancement, so made by said Gibson, corresponds

with the usual advancing rates of commission merchants in the said city of New York, at the time of said advancement.

The said writ of attachment was levied on the said property at the instance of the said branch of said State Bank of Indiana; and it was known to the State Bank of Indiana at the time of, and before, the levy of said writ of attachment, that the said loan had been procured from her said branch at Indianapolis fraudulently, by said McQueen & McKay, and that the said McQueen & McKay had invested the said money, so obtained, in the purchase of said pork and flour, and that said attachment is still pending; and that the original bills on which said money was obtained fell due after the levy under said attachment; and that none of said bills, on which said money was obtained, or any part thereof, have ever been paid, but were at maturity protested for non-payment.

It is also admitted, if the court should consider the circumstance legitimate or material, which the defendant denies, that in 1843 the said McQueen & McKay, and said Gibson, had a similar transaction in New York, in which the said McQueen & McKay acted with integrity, but with which the bank or the other parties had no connection.

Upon this case stated, the Circuit Court gave judgment for the defendant in replevin. The counsel for the plaintiff took an exception, and brought the case up to this court.

It was argued by *Mr. Romeyn* and *Mr. Wood*, for the plaintiff in error, and by *Mr. Bright* (in a printed argument), for the defendant in error.

**Points for the Plaintiff.* [*391

I. The attachment was prematurely brought. Because,—

1. The loan of its bills by the bank to McQueen & McKay was on an express agreement for credit; which agreement, if procured by fraud, was not void, but voidable, by the bank at its option. Chit. on Cont., 678; Story on Sales, §§ 420, 447, and cases cited; *Galloway* v. *Holmes*, 1 Doug. (Mich.), 336; *Rowley* v. *Bigelow*, 12 Pick. (Mass.), 307.

2. There being an express contract for a loan on time, if the bank elected to consider it fraudulent and to sue immediately, the action should have been in tort. Story on Sales, §§ 432, 434, 442, 446, and cases cited there; *Jones* v. *Hoar*, 5 Pick. (Mass.), 285; *Willett* v. *Willett*, 3 Watts (Pa.), 277; *Cary* v. *Curtis*, 3 How., 247, 248.

3. The remedy by foreign attachment in Indiana is confined to cases of debts due on contract and shown by affidavit; and the institution of such a suit was an affirmance of the contract

of loan; and, inasmuch as the stipulated term of credit had not expired, the action was prematurely brought. Code of Indiana of 1843, pp. 762, 763, 772, 773; *Linden* v. *Hooper*, Cowp., 418; *Ferguson* v. *Carrington*, 3 Carr. & P., 457, at *Nisi Prius*; same case in Bench, 9 Barn. & C., 59. This case is cited as law by Starkie, 2 Ev., 55; 1 Chit. on Pl., 157; 1 Com. on Cont., 221; *Dutton* v. *Solomonson*, 3 Bos. & P., 585; 15 Mass., 80, note *a*; *Galloway* v. *Holmes*, 1 Doug. (Mich.), 384.

In the present case, the question is not whether the bank had a right to disaffirm; but whether, by bringing this action, she did not in fact affirm the express contract.

The authorities cited show the general doctrine of the common law to be, that promises in law exist only in the absence of promises in fact; that where there is an express contract, suing in assumpsit is an affirmance of it; that in those cases in which it has been held that assumpsit would lie immediately on discovery of the fraud, there was a debt due, *in præsenti*, either by an express precedent contract, or by the absence of any agreement for credit; or the contract was incapable of confirmation and absolutely void, through illegality, or as being contrary to public policy.

It is further contended, that the attachment of the pork and flour, as the property of McQueen & McKay, was an affirmance of the contract with them. *Campbell* v. *Fleming*, 1 Ad. & Ell., 40; *Selway* v. *Fogg*, 5 Mees. & W., 86; *Thompson* v. *Morris*, 2 Murph. (N. C.), 248; *Dingley* v. *Robinson*, 5 Greenl. (Me.), 127; *Hanna* v. *Mills*, 21 Wend. (N. Y.), 90; Id., 175.

*392] A party cannot claim in repugnant rights, and is concluded *by the form of his action. *Smith* v. *Hodson*, 4 T. R., 217.

4. The retention of the bills of exchange, given by McQueen & McKay, as well as the form of the action, was an affirmance of the contract of loan. *Tobey* v. *Barber*, 5 Johns. (N. Y.), 72; *Dayton* v. *Trull*, 23 Wend. (N. Y.), 346; *Thomas* v. *Todd*, 6 Hill (N. Y.), 341; *Masson* v. *Bovet*, 1 Den. (N. Y.), 74; Story on Sales, § 427.

II. The bank, under her attachment, had no right, as against Gibson, to claim the pork and flour as the specific proceeds of her bills, on the ground of the alleged fraud of McQueen & McKay in procuring them. Because,—

1. She attached it as the property of McQueen & McKay, and for the benefit of their general creditors. If trover had been brought, the alleged fraud would have been disputed.

2. Having voluntarily parted with the possession and osten

sible ownership of her bills, she cannot claim them or their avails from a *bonâ fide* purchaser. *Parker* v. *Patrick*, 5 T. R., 175; *Mowrey* v. *Walsh*, 8 Cow. (N. Y.), 238; *Root* v. *French*, 13 Wend. (N. Y.), 572; *Hoffman* v. *Noble*, 6 Metc. (Mass.), 68; Story on Sales, § 200, and cases cited there.

III. The flour in the custody of Hanna, Hamilton & Co., and the pork in the hands of D. & J. A. F. Nichols, were the legal property of McQueen & McKay, at the time of the transfer thereof by them to Gibson, the plaintiff, and said McQueen & McKay held, at the time of the attachment, the beneficial interest only in the residue of the proceeds of sale thereof, to be made by Gibson, when the property reached him, after satisfying his advance thereon, with commissions and all other charges.

IV. McQueen & McKay acquired a vested legal title in said pork and flour, by their purchases. The bills of sale being their muniments of title, also a constructive possession thereof, the property remaining in the custody of the respective vendors, as their bailees. Because,—

1. The sale was a perfect vested sale, and not an executory agreement to sell at a future period. *Martindale* v. *Smith*, 1 Ad. & Ell. (N. S.), 389 (41 Cond. Com. Law, 595).

2. The bills of sale purport to pass a present vested interest, and they were delivered to McQueen & McKay. The payment of the purchase-money bound the bargain, and passed at once the legal title to them. *Barret* v. *Goddard*, 3 Mason, 110.

3. Whenever there is a present vested sale, valid in law, and the property sold is left with the vendor, he holds it in custody as bailee for the purchaser. *Elmore* v. *Stone*, 1 Taunt., 157; *Bailey* v. *Ogdens*, 3 Johns. (N. Y.), 416; *Dixon* v. *Yates*, 5 Barn. & Ad., 314.

*4. The pork and flour were sufficiently identified and distinguishable from all other property, there being [*393 no other pork in the warehouse, and the flour being marked. *Barret* v. *Goddard*, 3 Mason, 107; *Pleasants* v. *Pendleton*, 6 Rand. (Va.), 473; *Swanwick* v. *Sothern*, 9 Ad. & Ell., 895.

5. This construction is confirmed by the condition of the property at the time, and the general, well-established usage of trade in regard to it; which usage is to leave such produce in the warehouse till the opening of navigation, the warehouseman being in the meantime the bailee of the owner; and for the owner to get an advance thereon from the Eastern merchant, and to transfer the same to secure the advance: he to sell the same on commission.

6. The delivery on board of canal-boats provided for, was

a delivery as bailee for the purpose of transmission. The guarantee of inspection at Toledo was a warranty of quality, to be tested after sale, and it was not preliminary to the sale.

V. McQueen & McKay passed the entire legal title in said produce to the plaintiff, together with the beneficial interest, to the extent of his advance thereon, and gave him the constructive possession. Because,—

1. The condition of said produce was such as not to admit of actual delivery at the time, and it was in accordance with the course of business and the usage of trade to leave it with the warehouseman in the West.

2. The delivery order, according to the weight of authority, was sufficient of itself to pass the title to Gibson, on making the advance, before its presentment and acceptance.

3. But if not, the delivery to Gibson of the muniments of title, viz., the bills of sale, was sufficient for that purpose, especially when accompanied with a delivery order. *Hollingsworth* v. *Napier*, 3 Cai. (N. Y.), 182; *Wilkes* v. *Ferris*, 5 Johns. (N. Y.), 338; *Bailey* v. *Johnson*, 9 Cow. (N. Y.), 115; *Lucas* v. *Dorrien*, 7 Taunt., 279; *Greaves* v. *Hepke*, 2 Barn. & Ald., 131; *Pleasants* v. *Pendleton*, 6 Rand. (Va.), 473; *Ricker* v. *Cross*, 5 N. H., 571; *Ingraham* v. *Wheeler*, 6 Conn., 277; *Atkinson* v. *Maling*, 2 T. R., 465; *Brown* v *Heathcote*, 1 Atk., 162; *Gardner* v. *Howland*, 2 Pick. (Mass.), 599; Story on Sales, § 311; 2 Kent. Com., 500.

4. It was sufficient for the plaintiff to give notice of his purchases in a reasonable time to the respective bailees of the property, so as to exempt himself from the imputation of laches; which notice was given in this case. *Putnam* v. *Dutch*, 8 Mass., 290; *Meeker* v. *Wilson*, 1 Gall., 419; 5 N. H., 571; 6 Conn., 277.

*394] 5. The effect of the whole was to give the plaintiff the legal *title in the produce, and not a mere lien thereon, or a mere pledge of the property; and this is the effect whether the transfer be governed by the law of New York (which is properly applicable to it), or by the law of Indiana. Story on Conflict of Laws, §§ 316 to 325; *Black* v. *Zacharie*, 3 How., 512.

VI. If Gibson be considered as not having the entire legal title, but as a pledgee to the amount of his advances, he is *pro tanto* to be considered and protected as a purchaser. Story on Bailments, § 297; Story on Agency, § 361; *Lickbarrow* v. *Mason*, 2 T. R., 63; *Root* v. *French*, 13 Wend. (N. Y.), 572; *Holbrook* v. *Wight*, 24 Id., 169; *Hoffman* v. *Noble*, 6 Metc. (Mass.), 69; Story on Agency, § 111.

VII. The legal title of the plaintiff in said produce is not

superseded or divested by the levy of the attachment on the property. Because,—

1. The bank was not a *bona fide* purchaser. The attachment amounted only to an assignment *in invitum* by operation of law, and for the benefit of the creditors at large, as well as for the attaching creditor. Indiana Code, 1843, pp. 762–775; *Lempriere* v. *Pasley*, 2 T. R., 485; 1 Atk., 160; *Nathan* v. *Giles*, 5 Taunt., 558; *United States* v. *Vaughan*, 3 Binn. (Pa.), 394; *Ingraham* v. *Wheeler*, 6 Conn., 277; *Ricker* v. *Cross*, 5 N. H., 571; *Portland Bank* v. *Stacey*, 4 Mass., 663; *Putnam* v. *Dutch*, 8 Mass., 287; *Badlam* v. *Tucker*, 1 Pick. (Mass.), 389; *Gardner* v. *Howland*, 2 Id., 604; *Arnold* v. *Brown*, 24 Id., 95; note to *Lanfear* v. *Sumner*, 17 Mass., 114.

2. If the bank had been a *bonâ fide* purchaser of said produce of McQueen & McKay, instead of being attaching creditors, such purchase would not divest the plaintiff of his title, which is a legal title, with a constructive possession, fairly acquired and unaccompanied with any laches in notifying the bailee thereof, or in reducing the same to actual possession, according to the course of trade; such a legal title, being prior in time, is prior in right. See cases cited under last proposition; also *Caldwell* v. *Ball*, 1 T. R., 205; *Tuxworth* v. *Moore*, 9 Pick. (Mass.), 348; *Joy* v. *Sears*, Id., 4; *Turner* v. *Coolidge*, 2 Metc. (Mass.), 351; 3 Mason, 114; *Meeker* v. *Wilson*, 1 Gall., 422; *Phillemore* v. *Barry*, 1 Campb., 563.

The cases do not turn on the question of notice to an attaching creditor, but whether there has been such a delay in taking actual possession as to furnish evidence of fraud.

3. If the attachment had the character of a purchase, it would not be *bonâ fide* and without notice, within the reason of the rule, because McQueen & McKay were out of possession, actual or constructive, which put the purchaser upon inquiry, *and amounted to constructive notice of [*395 the prior legal transfer to the plaintiff. *Lucas* v. *Dorrien*, 7 Taunt., 278; 1 Gall., 422.

4. The bank, therefore, under the circumstances, took only the interest of McQueen & McKay then existing, and subject to all equitable, as well as legal, interests then outstanding against it.

VIII. The only interest of McQueen & McKay was the equitable beneficial interest in the residue of the proceeds of the produce when sold by the plaintiff on the consignment to him, after satisfying thereout his advances and charges on sales, which alone was attachable, and which did not warrant the officer in taking the property. Story on Bailments, § 353, and cases cited; *Badlam* v. *Tucker*, 1 Pick. (Mass.), 399;

Indiana Code, § 383, p. 744, and § 39, p. 770; *Evans* v. *Darlington*, 5 Blackf. (Ind.), 320.

IX. The rights of the plaintiff are not weakened by his having purchased the property out of the state of Indiana, to be sent and sold in New York, according to the course of trade. *Blake* v. *Williams*, 6 Pick. (Mass.), 307–314; *Black* v. *Zacharie*, 3 How., 514.

X. If there had been any danger that the plaintiff would have absconded with the property, to the injury of the equitable lien of the bank and other creditors, acquired by the attachment, (which is not shown or pretended,) their remedy would then have been in equity only.

XI. The warehouse receipt accompanying the transfer to Gibson was equivalent, under the usage of trade, to a bill of lading, and its transfer divested all outstanding title unknown to Gibson, whether legal or equitable. Because,—

1. Such instruments are assignable. Indiana Code, p. 576; Laws of New York of 1830, p. 203, § 5; 2 Rev. Stat., p. 60.

2. The case states that it was usual and customary to make advances on the assignment of proper evidences of title. *Noble* v. *Kennoway*, 1 Doug., 512; *Zwinger* v. *Samuda*, 7 Taunt., 265; *Lucas* v. *Dorrien*, Id., 288; *Barton* v. *Baddington*, 1 Car. & P., 207; *Keyser* v. *Suse*, Gow., 58.

The argument filed on behalf of the defendant in error was an elaborate support of the following points:—

1. If Gibson's claim be in the nature of a lien, he cannot recover, unless he, or his agent for the purpose expressly authorized, had the actual possession of the pork and flour before the attachment was levied. Under the circumstances of this case, a constructive possession cannot be conferred, for
*396] the following reasons:—1. Because the bills of parcels, &c., in this cause, do *not amount to warehouse receipts; for instance, the memorandum of Hanna, Hamilton & Co. is a mere receipted bill of parcels, and a guarantee of the inspection of the pork at Toledo; it does not even acknowledge the pork to be in store. Should the pork and flour not pass inspection, McQueen & McKay would not be bound to accept them. The bills of parcels, with their indorsements, &c., amount to nothing more than mere orders to deliver the pork and flour to Gibson; and until the Nicholses, and Hanna, Hamilton & Co., were presented with such orders, and they had accepted the same, and assented to hold the pork and flour for Gibson, as his agents, his lien could not attach; and the attachment having been sued out, and levied on the pork and flour in question before they received orders in favor of

Gibson, the attaching lien of the State Bank must prevail. 2. Although the memorandum may be considered as warehouse receipts, yet, there being no legislative enactment or usage in New York making the transfer and delivery thereof to confer a constructive possession of the pork and flour, their transfer and delivery to Gibson cannot have that effect. 3. Although, by the laws of New York, these memoranda might confer a constructive possession on Gibson, yet, as the pork and flour were, at the time of the delivery of those memoranda to Gibson, at Fort Wayne, in Indiana, the transaction must be governed by the laws of Indiana. In Indiana we have no law, or usage, giving such force to warehouse receipts.

2. Although Gibson should be regarded as an absolute purchaser, yet, as the attachment was levied upon the pork and flour before he or any agent of his had actual possession of them, Gibson cannot recover. *A fortiori* if Gibson's claim be only a lien.

3. If the pork and flour be regarded as a security to Gibson, for the repayment of the advance, nevertheless, as neither Gibson nor any agent of his had the actual possession of the pork and flour before they were attached, nor had the instruments by which his lien on the pork and flour was created been recorded in Allen county, Indiana, (the place where the pork and flour were,) within ten days, according to the Rev. Stat. of Indiana, 1843, p. 590, § 10, such assignment to Gibson is void as to the State Bank.

4. Whether Gibson's right be regarded as a lien on, or a purchase of, the pork and flour, still, as neither Gibson nor any agent of his, had the actual possession thereof, before the attachment was levied, Gibson cannot recover.

5. If Gibson be regarded a "deemed *pro tanto* purchaser," McQueen & McKay must be regarded as owners of the residue. *This condition of things necessarily makes [*397 Gibson and McQueen & McKay tenants in common of the pork and flour. If this be true, (which we regard as unquestionable, if Gibson be a "*pro tanto* purchaser,") the interest of McQueen & McKay in the pork and flour is attachable, and the officer attaching can, by virtue of the attachment, take the whole of the pork and flour, even out of the actual possession of Gibson, and deliver it over to the purchaser, and Gibson cannot replevy them from the officer or the purchaser under the attachment.

6. If Gibson's right be only a lien, although such lien may have attached on the pork and flour before the attachment of

the State Bank was levied thereon, nevertheless the interest of McQueen & McKay therein is attachable.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is one of much interest, and has been very fully argued. There is, however, but a single question in it, and that is, whether the property in dispute was transferred to the plaintiff in error, and vested in him, by the indorsement and delivery of the warehouse documents in the manner stated in the record.

The fact that McQueen & McKay by fraudulent means obtained the money from the bank, with which they purchased the pork and flour, is not material in the decision of this question. The bank in these proceedings does not claim the property as its own, upon the ground that it was purchased with money fraudulently obtained from it. If it had intended to assert its title as owner, it should have proceeded by some appropriate action to recover the property itself, or the value of it in damages. But the bank presents itself in the character of a creditor, seeking to collect its debt by an attachment against the property of its debtor. And the claims of both parties, plaintiff and defendant, rest upon the admission that the pork and flour were the property of McQueen and McKay, and had been left by them in the custody of the warehousemen as their bailees.

We are not, therefore, called upon to decide whether the owner of money fraudulently obtained from him can follow the proceeds in the hands of a *bonâ fide* purchaser without notice, and in the usual course of trade. As this question is not in the case, we forbear to examine it, although it was discussed in the argument at the bar. We must not, however, be understood as intimating that, if this point had arisen, the judgment of the court would have been different from that which we are about to give.

*398] *The case as it comes before us in substance is this: The pork and flour were purchased by McQueen & McKay, at Fort Wayne, in the state of Indiana, on the 4th of April, 1844. The articles were in the warehouses of the respective vendors at the time of sale, and the purchasers took from each of them a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal-boats soon after the opening of canal navigation. There was also a written guarantee from the respective vendors, that the articles sold should pass inspection. By the order of McQueen & McKay they were to be sent by canal

boats to Ludlow & Babcock, their agents at Toledo, in the state of Ohio, to be held by them until they received orders from McQueen & McKay.

The documents executed by the warehousemen, herein before mentioned, transferred the property and the possession of the pork and flour to McQueen & McKay, and the vendors from that time held it for them, and as their bailees.

Being thus in possession, McQueen & McKay afterwards, on the 17th of April, in the city of New York, in consideration of the advance of money mentioned in the statement of the case, delivered to Gibson, the plaintiff in error, the evidences of title which they had received from the vendors, indorsing thereon an order upon them to deliver the property to Gibson. They at the same time delivered to Gibson a letter to Ludlow & Babcock, their agents at Toledo, stating that they had received an advance from Gibson upon this property, and directing them to deliver it to him, and to comply with his orders.

Gibson was a commission merchant residing in New York, and it is admitted that this transaction with McQueen & McKay was in the usual course of his business. On the 27th of April, ten days after this transfer, the property was seized by the defendant in error, as sheriff, under an attachment issued on the same day at the suit of the bank, to obtain satisfaction for the debt due to it from McQueen & McKay. At the time of the attachment, the pork and flour still remained in the warehouses at Fort Wayne, and neither the warehousemen nor the attaching creditor had notice of the transfer to Gibson. The agent despatched by him arrived two days afterwards, and claimed the property. The sheriff refused to deliver it up, and this action of replevin was thereupon brought to recover it.

In examining the question between these parties, it is proper to say, that, if the fact had not been admitted that the dealing between McQueen & McKay and the plaintiff was in the usual course of trade, the court would yet have felt itself bound to take judicial notice of it. Apart from the [*399 fraud imputed to *McQueen & McKay, of which Gibson had no knowledge, the statement of facts in this case describes the usual course of the great inland commerce by which the larger part of the agricultural productions of the valley of the Mississippi find their way to a market. It has existed long enough to assume a regular form of dealing, and it embraces such a wide extent of territory, and is of such general importance, that its ordinary course and usages are now publicly known and understood; and it is the duty of the court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean. For if, by any de

cision of this court, doubt should be thrown upon the validity and safety of a contract fairly made according to the usages of this trade, and in the ordinary course and forms of business, the want of confidence would seriously embarrass its operations, to the injury of all connected with it, and would certainly be not less injurious to the agriculturist and producer than to the merchant and trader.

The transaction, therefore, being in the usual course of trade, and free from all suspicion of bad faith on the part of the plaintiff, the question to be decided is, what was the legal effect of the indorsement and delivery of the warehouse documents, in consideration of the advance of money he then made to McQueen & McKay? In the opinion of the court, it transferred to him the legal title and constructive possession of the property; and the warehousemen from the time of this transfer became his bailees, and held the pork and flour for him. The delivery of the evidences of title and the orders indorsed upon them was equivalent, in the then situation of the property, to the delivery of the property itself.

This mode of transfer and delivery has been sanctioned in analogous cases by the courts of justice in England and this country, and is absolutely necessary for the purposes of commerce. A ship at sea may be transferred to a purchaser by the delivery of a bill of sale. So also as to the cargo, by the indorsement and delivery of the bill of lading. It is hardly necessary to refer to adjudged cases to prove a doctrine so familiar in the courts. But the subject came before this court in the case of *Conard* v. *The Atlantic Insurance Co.*, in 1 Pet., 445, where this symbolical delivery was fully considered and sustained. The same principle was decided in the case of *Brown* v. *Heathcote*, 1 Atk., 160; *Greaves* v. *Hepke*, 2 Barn. & Ald., 131; *Atkinson* v. *Maling*, 2 T. R., 465; *Wilkes and Fontaine* v. *Ferris*, 5 Johns. (N. Y.), 335; *Pleasants* v. *Pendleton*, 6 Rand. (Va.), 478; *Ingraham* v. *Wheeler*, 6 Wend. (N. Y.), 277; *Ricker* v. *Cross*, 5 N. H., 571; *Gardner* v. *Howland*, 2 Pick. (Mass.), 599; *2 Kent Com., 499; Story on Sales, § 311. The rule is not confined to the usages of any particular commerce, but applies to every case where the thing sold is, from its character or situation at the time, incapable of actual delivery. The contract between the plaintiff and McQueen & McKay having been made in New York, the articles in the warehouses at Fort Wayne were incapable of actual delivery; consequently, the delivery of the evidences of title, with the order to the bailees indorsed on them, passed the title and possession to the plaintiff.

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It is true there is no formal assignment indorsed on the

warehouse document. But the technical rules of common law conveyances and transfers of property had never been applied to mercantile contracts made in the usual course and forms of business. The indorsement of the delivery order upon these evidences of his title, like the indorsement upon a bill of lading, sufficiently manifests the intention of the parties that the title and possession should pass to Gibson. And when that intention is evident from the language of the written instruments and the nature and character of the contract, it is the duty of the court to carry it into execution without embarrassing it with needless formalities. A contrary rule would most commonly defeat the object which both parties designed to accomplish, and believed they had accomplished, by the instruments they executed.

Nor, as respects the legal title, can there be any distinction between the advance made by Gibson, and the case of an actual purchaser. To the extent of his advances he is a purchaser, and the legal title was conveyed to him to protect his advances. It is not like the lien of a factor, who makes advances for his principal upon goods in his possession. But even in that case the property cannot be withdrawn from his hands until his advances are repaid. But in the case before us, the title of Gibson is not a mere lien. The legal title, the right of property, passed to him, and McQueen & McKay retained nothing but an equitable interest in the surplus, if any remained after satisfying the claims of Gibson. The case of *Conard* v. *The Atlantic Insurance Company*, before referred to, was the case of a loan of money upon a respondentia bond upon a cargo at sea, secured by an assignment on the bill of lading, and in that case the court said,—"It is true that, in discussions in a court of equity, a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law." 1 Pet., 441.

*The guarantee that the articles should pass inspection does not affect the character of the transaction, [*401 nor convert it into an executory contract. It is nothing more than the usual warranty of the soundness and quality of the thing sold, which is taken by the purchaser in every sale of personal property when he does not choose to take the risk upon himself.

It appears that the attachment was laid before the warehousemen received notice of the transfer to Gibson. Undoubtedly it was his duty to use reasonable diligence in giv-

ing notice both to them and the agent at Toledo. And negligence in this respect on his part would be regarded as evidence of fraud, and might moreover put in jeopardy his right of property, if it passed into the hands of a *bonâ fide* purchaser without notice, and in the usual course of trade. But in this case there has been no unreasonable delay. The notice was promptly given, and the receipt of it by the bailees was not necessary to complete his title. As between him and the creditors of McQueen & McKay, the property and possession vested in him at the time of the transfer and delivery of the documents. The cases before referred to establish this principle.

Neither is the equitable interest of McQueen & McKay in the surplus (if any remain) material to the decision. This equitable interest is no doubt liable to attachment by the laws of Indiana. But that liability will not authorize the attaching creditor to take the property out of the hands of the legal owner, before his claims upon it are discharged. The equity of redemption upon a mortgage of real property is liable to attachment. But it will scarcely be contended, that the attaching creditor, or a purchaser under the attachment, or the officer levying it, could maintain an ejectment against a mortgagee in possession, or in any other way interfere with his possession, when holding it as security for money due him. The same rule applies to a mortgagee of personal property holding the legal title and possession to secure his advances.

Upon the whole, therefore, we think there is error in the judgment of the Circuit Court, and that it must be reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this
*402] cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein in conformity to the opinion of this court.

JOHN WEST, APPELLANT, *v.* JOSEPH SMITH AND ELLEN, HIS WIFE.

Where a bill was filed in the Circuit Court of the United States for the County of Alexandria, by a legatee, against the executor and residuary devisee, praying for the sale of the real estate in order to pay legacies, the personal estate being exhausted, it was not necessary to make a special devisee of land in Virginia who resided in Virginia, a party defendant.

The Orphans' Court had power to allow a commission to the executor for paying over a specific legacy, and a right to extend this commission to ten per cent.

Under the laws of Virginia, the executor had a right to refrain from pleading the statute of limitations when sued, and to pay a judgment thus obtained against him. The judgment, at all events, must stand good until reversed.

Where the executor paid legacies to persons who had occupied property, which, it was alleged, belonged to the deceased, and the occupiers claimed to hold it in consequence of an uninterrupted possession of twenty years, the justice of their claim could not be tried in a collateral manner, by objecting to this item of the executor's account, on the ground that he should have set up the claim for rent in set-off to the legacy.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia and County of Alexandria, sitting as a court of equity.

It was a bill filed in the Circuit Court by Ellen Smith, then Ellen Mandeville, one of the legatees of Joseph Mandeville, deceased, whose will was before this court for construction at January term, 1844. The case is reported in 2 Howard, 560. It will be seen by reference to that case, that John West became a party to the proceedings, upon the ground of being the residuary legatee, and, as the court then held, residuary devisee also.

Ellen Mandeville, who intermarried with Joseph Smith pending the suit, was a legatee under that will for $3,000. One of the clauses of the will was this. "If my personal property should not cover the entire amount of legacies I have or may give, my executors will dispose of so much of my real estate as will fully pay them."

Mandeville, the testator, died in July, 1837.

In May, 1839, Ellen Mandeville filed her bill in the Circuit Court, (to which suit her husband, Smith, afterwards became a party,) charging the making and publication of the will, the bequest to herself and others of certain legacies, which in default of personal assets were chargeable upon the real estate, the death of the testator, and the deficiency of personal assets; *and praying a sale of lands for the satisfaction of her legacy. To this bill, all the other pecuniary [*403 legatees, the residuary devisee, West, and the executor of Mandeville, were made defendants.

It is not necessary to trace the progress of the suit through its successive stages. It was at last referred to a master in chancery, who reported sundry matters of account, to some of which exceptions were taken by the defendant, West. The court, however, overruled these exceptions, and proceeded to decree a sale of so much of the real estate as might be necessary to pay the legacies. From this decree West appealed, and the case now came before this court upon the exceptions to the master's report. Only four of these exceptions were insisted on in the argument, viz., the second, third, seventh, and eighth.

They were as follows. The first exception is inserted for the purpose of explaining the second:

1. For that said commissioner has improperly allowed William C. Gardner, deceased, a credit in his account as executor of Joseph Mandeville, deceased, the sum of eight hundred and forty-two dollars and ninety cents, as having been paid to Sarah A. Hill, "a specific legacy of slaves, furniture, &c., as appraised," which said property was properly subject, at the time of its delivery to the said legatee, Sarah A. Hill, to the payment of the debt of Joseph Mandeville, deceased.

2. For that the said commissioner has improperly allowed the said William C. Gardner, deceased, as a credit in his said executorial account on the estate of Joseph Mandeville, deceased, the sum of eighty-four dollars and twenty-nine cents, as a commission on the said $842.90, mentioned in the first foregoing exception, which said sum was not so due to said Gardner.

3. For that the said commissioner has improperly allowed the said Gardner, as a credit in his said executorial account, the sum of three hundred and sixteen dollars and thirty-seven cents, and a further credit in said account of nine hundred and twenty dollars and twenty-six cents (920.26), as having been paid by said Gardner on account of a judgment in favor of Samuel Bartle, against said Gardner, as executor of Joseph Mandeville, deceased, the items or most of them forming the account of said Bartle against said Mandeville's estate, on which said judgment is predicated, being unsustained by legal proof, and barred by the statute of limitations.

7. For that the said commissioner has improperly reported the sum of fifteen hundred dollars, with the several sums of two hundred and twenty-five dollars and four hundred and fifty dollars interest thereon, after allowing a credit of one hundred *and fifty dollars, as a legacy due to Mary Mandeville, under the will of Joseph Mandeville, deceased; the said legacy being subject to a further credit of two hun-

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dred and twenty-five dollars, for the use and occupation of a portion of the real estate of Joseph Mandeville deceased.

8. For that the said commissioner has improperly reported the sum of fifteen hundred dollars, with seven hundred and thirty-five dollars, the interest due thereon, as a legacy to Julia Mandeville, under the will of Joseph Mandeville, deceased, when the same should have been credited with the sum of two hundred and twenty-five dollars for the use and occupation of a portion of the real estate of Joseph Mandeville, deceased.

The cause was argued by *Mr. Jones*, for the appellant, and *Mr. Neale* and *Mr. Davis*, for the appellees.

Mr. Jones submitted a preliminary objection of a defect of parties, because of the nonjoinder as a defendant of James Mandeville, a nephew of the testator, and a specific devisee of ten thousand acres of land upon the head-waters of Guyandotte River, in Virginia.

He then proceeded to argue, in support of the second exception, that no commission was allowable on the specific legacy, in addition to the general commissions incident to the administration of the assets.

Of the third, that the executor suffered judgment at the suit of Bartle, in consequence of his improper and illegal concessions, and of evident negligence, amounting to a *devastavit*.

Of the seventh and eighth, we maintain,—1st. That the evidence clearly entitled the exceptant to the set-offs claimed in these exceptions. 2d. That the pretence set up, of long possession under a parol gift, was wholly unsupported by evidence,—indeed disproved,—and was moreover barred by estoppel, the parties claiming both under and against the will.

And further maintained, that the court erred in proceeding to the final decree, whilst the claims of the two creditors and the two legatees named in these exceptions remained *sub judice*.

Lastly, that the court had no jurisdiction to decree satisfaction of the creditors out of the real estate.

Mr. Neale, for defendants in error.

2d Exception. If this exception is made as a legal and valid objection, it is thought that such is not the law; on the contrary, the allowance is fully authorized by law. No doubt the commissioner was guided by the allowance made the executor of Mandeville by the Orphans' Court of Alexandria county, in *which the accounts were [*405

settled; and that court had full power and authority, under the testamentary system of Maryland, to make the allowance, it being a matter within the admitted discretion of the court; and being in its discretion, not even an appeal, much less this exception, is sustainable. 2 Laws of Maryland, 482; Dorsey's Testamentary Law of Maryland, 17; 1 Pet., 565; 5 Id., 224.

The exception, if sustained, might, by a future proceeding on the part of the appellant against the executor's legal representative, tend to defeat, at least in part, the commission allowed Mandeville's executor by the Orphans' Court aforesaid, and which could only have been done, in the first instance, by an appeal, alleging and proving fraud in its procurement. It would, therefore, seem to be an attempt to do that indirectly, which could not have been done directly and lawfully.

8d Exception. This exception is clearly untenable for the following reasons; that is to say, because the judgments of every court of competent jurisdiction, if fairly obtained, are conclusive upon the parties, until reversed by writ of error or supersedeas; nor can a court of equity look into them, unless fraud, mistake, accident, or surprise in their procurement be alleged and proved; in such a case, it is admitted that chancery has jurisdiction. But no such allegations are to be found in the record of this cause, and for want thereof, this honorable court, sitting as an appellate chancery court, will not, it is imagined, disturb the allowance. The appellant was made a party defendant on the 8th of June, 1842, and although Commissioner Eaches made his report on the 31st of May, 1839, the appellant never filed exceptions thereto until the 8d of October, 1846, long after the death of Mandeville's executor; and having so long failed to do so, it is submitted whether the court will now entertain the same. 2 Robinson's Pr., 214, 383; 3 How., 691; and the same remarks apply to Commissioner Green's report.

(*Mr. Neale* then went into an argument that the statute of limitations did not apply.)

7th and 8th Exceptions. The claim set up by the appellant for use and occupation is strictly legal, and as a general principle can only be enforced in a court of law. Such claim must be founded on the privity of contract, either express or implied, and neither the one nor the other can arise without the previous relation of landlord and tenant. 1 How., 153.

No such relation is pretended in this case; none such ever existed; the parties, on the contrary, are now contending before *the court below, in a suit at law, about their legal rights to the lot of land in question, and to the rent of

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which lot the appellant in this chancery suit claims to be entitled. It would therefore appear to be a fit subject for an action at law, and not a bill in equity, for the right of property in this case is a question which involves matters of fact as well as of law, and should be adjudicated in a court of law, where the appellant has adequate remedy; and having such remedy, a court of equity is not the proper forum. 1 Laws U. S., old edition, p. 59, § 16.

The evidence in the record is, that the Misses Mandeville entered on the premises in dispute, under a gift from their uncle, the late Mr. Mandeville, and that they held, used, and occupied it for more than twenty years prior to their said uncle's death, and that, too, with his personal knowledge and consent, and that they still hold, use, and occupy it as their own property. If, then, the Misses Mandeville entered on the premises under color or claim of title, and held possession adversely to their uncle for so long a period, with his knowledge, and without any attempt on his part to eject them, it gives them good right and title under Virginia law, and is a complete bar to a possessory action, although it might not be against a writ of right, founded on the seizin of the appellant's devisor or testator, for in Virginia it has been decided that a devisee, like an heir, may maintain a writ of right.

Mr. Davis, for the defendant in error, contended that the exceptions were properly overruled:—

As to the first exception, because,—

1. The realty as well as personalty being liable, under the will and law, to both debts and legacies, it is immaterial to the residuary devisee and legatee to which object the personalty is applied. *Tayloe* v. *Thomson*, 5 Pet., 367; 5 Geo. II., ch. 7 (1732); *Silk* v. *Prime*, 1 Dick., 384; 1 Bro. C. C., 138, *n;* 2 Stat. at L., 103, 104, §§ 1–756, § 4.

2. Had the executor sold the specific legacy for payment of debts, the legatee would have been substituted to the creditor's rights against the realty; it being liable to the debts by law, and charged with the legacies by will, and only the residue given to West.

By analogy to specialty creditors, 2 Lomax on Executors, 252, 253, § 7, 253, 254, §§ 14, 15, 16; *Byrd* v. *Byrd*, 2 Brock., 171.

Or where the devise is of the residue of personalty and realty, **Hanby* v. *Roberts*, 1 Ambl., 129; 2 Smith Ch. Pr., 282; *Norris* v. *Norris*, 1 Dick., 253; *Headly* v *Rochead*, Coop., 51. [*40*

Or when the lands are charged with debts, *Keeling* v. *Brown*,

5 Ves., 859; 2 Smith Ch. Pr., 282, 283, (*a*); *Eland* v. *Eland*, 4 Myl. & C., 42; 1 Story Eq. Jur., §§ 565, 566; *Clifton* v. *Burt*, 1 P. Wms., 678, 679, Cox's note; *Haslewood* v. *Pope*, 3 P. Wms., 323; 2 Lomax on Ex'rs, 254, § 13.

3. The language of the will imports a debt, and this legacy in satisfaction.

As to the second exception, because the commission is an incident to the legacy, and has been allowed by the Orphans' Court, and for the reasons given on the first exception.

As to the third exception, because,—

1. The exception does not specify item by item the part objected to, nor the grounds of objection, and is in the alternative. *Harding* v. *Hardey*, 11 Wheat., 103; *Wilkes* v. *Rogers*, 6 Johns. (N. Y.), 568, 591, 592; *Story* v. *Livingston*, 13 Pet., 359, 365, 366; *Buller* v. *Steele*, reported in 2 Smith Ch. Pr., 372.

2. If the exception covers all the items, then, as some are proper, it must be overruled. *Green* v. *Weaver*, 1 Sim., 404; 3 Cond. Ch. R., 204, 218, 219.

3. No objection was made before the master for want of, or to the competency of, the proof.

4. The verdict and judgment fix the debt as due at testator's death; and the receipts on the execution show its payment. *Garret* v. *Macon*, 2 Brock., 213, 214; *Strodes* v. *Patton*, 1 Id., 230, 231; *Powell* v. *Myers*, 1 Dev. & B. (N. C.), Eq., 502; *Munford* v. *Overseers of Poor*, 2 Rand. (Va.), 313, 316; *Chamberlayne* v. *Temple*, 2 Id., 384, 396, 397.

5. There is no bill of particulars, nor any part of the record showing the items on which said judgment is founded.

6. The burden of showing the items to be barred rests on the exceptant, the judgment being *primâ facie* evidence of a just debt, and he has produced no proof, either of what the items were, or of what proof was before the jury, or that any of them were barred by limitation.

7. If he rely on the report and account incorporated by the clerk in the record of *Bartle* v. *Mandeville's Executor*, it is no part of the record, and so not competent evidence. *Cunningham* v. *Mitchell*, 4 Rand. (Va.), 189, 190, 192; *Moore* v. *Chapman*, 3 Hen. & M. (Va.), 260, 267; *Lessor of Fisher* v. *Cockerel*, 5 Pet., 248; *Lessor of Reed* v. *Marsh*, 13 Id., 153. It does not appear ever to have been returned and filed in court, nor to have been confirmed or adopted by the court or parties. No judgment was entered on it. It does not appear even to have been *read before the jury. Nor that it was all or the only evidence before them; and in the absence of proof to the contrary, the verdict and judgment must be pre-

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sumed right. *Thompson* v. *Tomlie*, 2 Pet., 165; *Grignon's Lessee* v. *Astor et al.*, 2 How., 319, 340; *Voorhees* v. *Bank of United States*, 10 Pet., 472, 473; *Williams* v. *United States*, 1 How., 290; 1 Saund., 329, notes 3, 4, 330, *n.* 5; 2 Id., 50, *n.* 3; 1 Id., 334, *n.* 9; 2 Lomax on Exec., 428, 429, § 33.

8. If the report is to be considered, then it does not appear from it that any item allowed in that report accrued more than five years before testator's death, nor more than five years before the commencement of the suit, and it rests on the exceptant to show that the items were barred. *Adams* v. *Roberts*, 2 How., 486, 496.

Testator died 25th July, 1837, nar. filed Aug. rules, 1838. The capias must have been before May, 1838; it may have been before October, 1837, and on or at any time after July 25, 1837, the date of testator's death.

All the items reported as due or as suspended, i. e., for further evidence, appear to have accrued during or after 1834,—except $158.19½, the several sums of $26.88, $17.23, $22.37, making $66.48, and $37.62.

The $37.62 is dated 1833; it may have accrued in January, or in December, 1833; in either case, it may have been within five years from the beginning of the suit; if after May, it must have been so.

The items composing $66.48 have nothing to fix their date, except that they are prior to April 30, 1835.

The item of $158.19½ has no date assigned; it is only said to have been found in a book for 1831, 1832, and 1833; if it accrued due after July 25th, 1832, it may have been within five years of writ, and was within five years before testator's death.

Rev. Code (1792), 167, s. LVI. 8. The law requiring the court to strike out the items barred, and dispensing with a plea of limitation, the presumption is that any item which, though apparently barred, has not been stricken out, was sustained by evidence removing the bar. 2 Lomax on Exec., 423, § 25; 2 Pet., 165; 2 How., 340; *Brook* v. *Shelly*, 4 Hen. & M. (Va.), 266.

9. If any items be apparently more than five years before suit, but not before testator's death, the executor may have promised to pay them within the five years; which he had a right to do.

The obligation to plead statute is discretionary, and failure should be shown to be unreasonable.

*10. The dealings between Bartle and Mandeville were mutual, long continued, and complex, and probably neither party kept or had full proof of all items, so that [*409

the only mode of making a fair settlement was by reference to a commissioner, with production of books and papers, and it should be shown that this proceeding was ill advised, as in case of submission to arbitration. *Strodes* v. *Patton*, 1 Brock., 230, 231.

11. It appears, on the contrary, to have been prudent and beneficial, for,—1st. Mandeville gets credit by his own books for $912.01, 17th February, 1834. 2d. For $1314.06, for none of which is there any proof in the record or report, and which seems to have come entirely from Mandeville's books by consent of plaintiff. 3d. For the claims of S. B. Larmour & Co., Daniel Cawood & Co., against Bartle, included in the above $1314.06, otherwise than by consent not an offset.

As to the seventh and eighth exceptions:—

1. A joint demand cannot be set off against a several demand. 2 Story Eq. Jur., § 1437.

2. Credit for the whole sum is claimed against each legacy.

3. It does not appear that any such sum is due as claimed, no tenancy being proved, and, on the contrary, an adverse occupation being expressly reported.

Mr. Justice WOODBURY delivered the opinion of the court.

The original proceeding in this case was a bill in chancery instituted in September, 1839, in the Circuit Court for the District of Columbia, sitting for the County of Alexandria. The object was to recover a legacy of $3,000, bequeathed by Joseph Mandeville, in 1837, to Ellen Mandeville, now the wife of Smith.

William C. Gardner, the executor, took upon himself the execution of the will, and was made one of the original defendants, with West and several other legatees. West, being residuary legatee, took a leading part in conducting the defence in the Circuit Court, and made the appeal to this court. Various answers were put in by the respective respondents, several depositions filed, and some documentary evidence. From these it appears, that proceedings had for some time been instituted in the Orphans' Court for the County of Alexandria, for the purpose of settling the estate of Joseph Mandeville. Most of the debts had been adjusted, and some of the legacies; and the personal estate being exhausted, permission had been asked to sell and apply a part of the real estate, situated in said county of Alexandria, to pay the residue.

410] To this application, as well as to some of the previous proceedings and decrees in the Orphans' Court, sundry objections had been interposed. But the exceptions

made by West to the last report of the commissioner, in the Circuit Court, in May, 1846, disclose all the matter finally relied on in opposition in that court by the respondent. Those exceptions having been there overruled, this appeal was taken.

Before going into the consideration of those exceptions in detail, and the correctness of the decision which was pronounced upon them, it may be well to dispose of a preliminary question raised here, that James Mandeville of Virginia, a legatee of 10,000 acres of land there situated, ought to be made a party defendant, with those already before the court.

We feel obliged to overrule this objection.

It is not clear, that it could be made here after an appeal; though, if proper, the case might perhaps be sent back, and an amendment made there,—as new parties can be admitted there as late as the final hearing. (Mitford, Pl., 144, 145; *Owing's Case*, 1 Bland (Md.), 292; *Clark* v. *Long*, 4 Rand. (Va.), 451.)

At the same time, it is true as to exceptions to a master's report, that none can generally be made in the appellate court which were not taken below. *Brockett et al.* v. *same*, 8 How., 691. The objection here, however, must in any view be overruled, because the Orphans' as well as the Circuit Court, for the county of Alexandria, proceeded, and ought to have proceeded, against parties and property situated within their limits, and not against either situated like James Mandeville and his land in Virginia, and without their jurisdiction. *Hallett* v. *Hallett*, 2 Paige (N. Y.), 15; *Townsend* v. *Auger*, 3 Conn., 354. Though he held his land under the same will, yet it is admitted that he and his land were both in another state. Another excuse for not joining him is, that property enough existed within the county of Alexandria to discharge the claims of the original plaintiffs, without a resort to James Mandeville, or the land devised to him. *Russell* v. *Clarke's Executors*, 7 Cranch, 72.

Especially must West and all the property devised to him be first made liable, as he is only a residuary legatee, or, in other words, is entitled only to what is left, after all others are satisfied. And, finally, it was not necessary to make James Mandeville a party to this bill, when neither he nor his land could be affected by a decree made against other persons and other lands, and in a case instituted in another jurisdiction and in which no service had been made on him. *West* v. *Randall*, 2 Mason, 181; *Joy* v. *Wirtz*, 1 Wash. C. C., 517; *Elmendorf* v. *Taylor*, 10 Wheat., 152; *Wheelan* v *Wheelan*, 8 Cow. (N. Y.), 538.

*To proceed next to the consideration of the exceptions made below, it is to be remembered that the first one was waived at the hearing, and need not, therefore, be repeated. The second exception is, that the executor, Gardner, was improperly allowed a commission of $84.29 on a specific legacy of slaves, furniture, &c., made and paid to Sarah A. Hill.

This commission was at the rate of ten per cent.; and though that rate seems high, yet, if the Orphans' Court had authority to make any allowance in such a case, its decision within its authority and jurisdiction must be considered binding. 1 Pet., 566; *Thomas* v. *Fred. City School*, 9 Gill & J. (Md.), 115.

On general principles, it would seem just and proper for all such courts to make some compensation to executors for such services as paying over legacies, no less than for paying debts. In the case of specific legacies, the trouble and risk are as great, if not greater, than in moneyed legacies, and it would be difficult to find elementary principles to justify commissions in one case, and withhold them in the other.

If this point is to be governed by these principles, as it must be, provided the laws of Virginia at that time controlled the matter in the county of Alexandria, then the exception must fail under those principles, and under a practice, well settled there, authorizing in such cases a *quantum meruit*. Under that, as much as ten per cent. on moneys received and paid out has in several instances been sanctioned. *McCall* v. *Peachy*, 8 Munf. (Va.), 301; and *Hutchinson* v. *Kellam*, Id., 202.

But if it is to be governed by the laws of Maryland, as is contended by the plaintiffs, a like result will follow, by means of express statutory provisions and decisions in that state.

They contend this, because in February, 1801, Congress established in Washington and Alexandria counties an Orphans' Court for each county, and provided that they "shall have all the powers, perform all the duties, and receive the like fees, as are exercised, performed, and received by the register of wills and judges of the Orphans' Court within the state of Maryland," &c. 2 Stat. at L., p. 107, § 12; *Yeaton* v. *Lynn*, 5 Pet., 230.

It is argued, that this provision extended to the power and duty of the Orphans' Court in Virginia to allow commissions as large as here, and for specific as well as moneyed legacies, and not to the mere organic structure and jurisdiction of the Orphans' Court, leaving all else in Alexandria County to be

governed by the laws of Virginia, and in Washington County by the laws of Maryland.

If this view be correct, which is supposed to be the one *usually acted on in this District, it was provided [*412 in Maryland by statute in 1798, ch. 101, that a commission may be allowed, "not under five per cent., nor exceeding ten per cent. on the amount of the inventory." *Nichols et al.* v. *Hodges*, 1 Pet., 565; 5 Gill & J. (Md.), 64.

The third exception is, that a judgment was allowed by the executor to be recovered by one Bartle against the estate of the deceased Mandeville, which "was unsustained by legal proof, and barred by the statute of limitations."

But this judgment was recovered after due notice and hearing. No fraud or collusion is set up or proved between the parties to it, for the purpose of charging the estate. And the chief, if not only, exception to its fairness or validity is, that Gardner, the executor, did not plead the statute of limitations to a part of the claim on account, when he might have done it under the apparent time when the cause of action accrued on that item. But in Virginia, and especially if the court, by not striking out the item, sanction a waiver of the statute, as is inferred to have been done here, the executor seems fully justified in not pleading it. (2 Lomax on Exec., 419; *Bishop* v. *Harrison*, 2 Leigh (Va.), 532; 1 Robinson's Pr., 112; 1 Rev. Stat., 492.) So in England, formerly, the executor was held excused in his discretion from interposing as a defence the statute of limitations. (*Norton* v. *Freeker*, 1 Atk., 526.) But in a recent case, doubt is cast over this in England, in 9 Dowl. & Ry., 43.

The Virginia law, however, must control here, and conduces to justice, when the court or the executor is satisfied no payment has been made, or that there had been a re-promise by the deceased. *Holladay's Ex'rs.* v. *Littlepage*, 2 Munf. (Va.), 316; 4 Hen. & M. (Va.), 266.

At all events, on elementary principles, the judgment thus obtained must stand as binding till duly reversed, and be till then for most purposes presumed correct. *Voorhees* v. *Bank of United States*, 10 Pet., 472, 489; 2 How., 319; *Lupton* v. *Janney*, 13 Pet., 381.

Under the sixth and seventh exceptions, the respondent insists that Mary and Julia Mandeville, legatees of the deceased, ought to have been charged rent for a piece of land which they occupied, and that the amount thereof ought to have been deducted from these legacies.

It is true that this land once belonged to the deceased, but Mary and Julia insist that they have been in the exclusive

occupation of it for more than twenty years. They had always since their entry claimed it as their own, and this land was not, *by name, devised by the deceased to any one, as if still his property. The legatees insisted, that at first, being relations of J. Mandeville, and the premises contiguous to their house, they were given to them for a garden, and that their possession had ever since been adverse to all the world. Nor was there any contract shown to pay rent by them to him; nor any proof that rent had ever been demanded by him while living. Without, then, settling here the disputed title to this property, it is sufficient to say, that under these peculiar circumstances such a use and occupation of these premises would not warrant the recovery of rent from them in an action of assumpsit at law. 1 Chit. Pl., 107; *Birch* v. *Wright*, 1 T. R., 387; *Smith* v. *Stewart*, 6 Johns. (N. Y.), 46. Such an action must rest on a contract express or implied. *Lloyd* v. *Hough*, 1 How., 159, and cases there cited. And if no implied promise could be raised to recover rent, when the occupation is adverse, and no express one is pretended to exist, the executor could not legally set off this claim against their legacies.

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The rights to the land, or to any rent thereon, must be settled by a direct action at law, and not in this collateral manner; and if the legatees do not succeed there, they can be made to pay, in trespass, for mesne profits, what they are not liable for as rent, *ex contractu*, when holding adversely.

A concluding objection to the proceedings below, subsequent to overruling the written exceptions to the report, is, that the court proceeded to a final decree whilst the claims of two of the creditors and two of the legatees were held under consideration.

But either those claims are independent and not necessary to be decided before a final decision on the rest,—or they are so connected, that a decision on them was proper at the same time, and then this appeal itself would be premature, and would have to be dismissed. 4 How., 524; *Perkins* v. *Fourniquet et al.*, 6 How., 206. This, it is understood, is not moved, nor desired by either party.

Such independent claims, however, may properly be suspended under the circumstances existing here, according to *Royal's Administrators* v. *Johnson et al.*, 1 Rand. (Va.), 421.

The judgment below must, therefore, be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the

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District of Columbia, holden in and for the County of Alexandria, and was argued by counsel. On consideration whereof, it is *now here ordered, adjudged, and decreed [*414 by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

JOHN D. MURRILL AND THE BANK OF NEW ORLEANS, APPELLANTS, *v.* ALEXANDER NEILL AND WILLIAM T. SOMERVILLE.

A merchant who owed debts upon his own private account, and was also a partner in two commercial houses which owed debts upon partnership account, executed a deed of trust containing the following provisions, viz.:—

It recited a relinquishment of dower by his wife in property previously sold and in the property then conveyed, and also a debt due to the daughter of the grantor, which was still unpaid, and then proceeded to declare that he was indebted to divers other persons residing in different parts of the United States, the names of whom he was then unable to specify particularly, and that the trustee should remit from time to time to Alexander Neill, of the first moneys arising from sales, until he shall have remitted the sum of $15,000, to be paid by the said Neill to the creditors of the said grantor, whose demands shall then have been ascertained; and if such demands shall exceed the sum of $15,000, then to be divided amongst such creditors *pari passu;* and out of further remittances there was to be paid the sum of $12,000 to his wife as a compensation for her relinquishment of dower, and next the debt due to his daughter, and after that the moneys arising from further sales were to be applied to the payment of all the creditors of the grantor whose demands shall then have been ascertained. In case of a surplus, it was to revert to the grantor.

The construction of this deed must be, that the grantor intended to provide for his private creditors only out of this fund, leaving the partnership creditors to be paid out of the partnership funds.

Under the deed, it was the duty of the trustee to divide the first $15,000 amongst the private creditors of the grantor, and exclude from all participation therein the creditors of the two commercial houses with which the grantor was connected; next to pay the debts due to the wife and daughter; then to pay in full the private creditors, or divide the amount amongst them, proportionally.

The rule is, that partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners, with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid.[1]

The American and English cases respecting this rule examined.

[1] FOLLOWED. *Davis* v. *Howell*, 6 Stew. (N. J.), 75. CITED. *Bowen* v. *Billings*, 13 Neb., 443. S. P. *Collins* v. *Hood*, 4 McLean, 186; *Matter of Warren*, Davels, 320; *Matter of Ingalls*, 5 Law Rep., 401; *Ex parte Byrne*, 16 Am. L. Reg., 499; *Inbusch* v. *Farwell*, 1 Black, 566; *Peck* v. *Schuetze*, 1 Holmes, 28; *Crane* v. *Morrison*, 4 Sawy., 138; *Bailey* v. *Kennedy*, 2 Del. Ch., 12; *Cox* v. *Russell*, 44 Iowa, 556; *Bond* v. *Nave*, 62 Ind., 505; *Davis* v. *Howell*, 6 Stew. (N. J.), 72.

Murrill et al. v. Neill et al.

THIS was an appeal from the Circuit Court of the United States for the District of Maryland, under the following circumstances.

On the 24th of September, 1839, Luke Tiernan, of the city of Baltimore, and Anne, his wife, made a deed of trust to Charles H. Carroll, of Livingston County, New York, thereby conveying to said Carroll about 5,888 acres of land, part of Tuscarora Tract, in said Livingston County, of which Luke Tiernan was seized in fee simple as his individual property. The property so conveyed is in said deed estimated to be worth about $120,000.

*415] *The deed, among other things, recites that Anne, the wife of Luke, had previously joined in a conveyance of various portions of said tract, the property of said Luke, which before that time had been sold, without receiving for her separate use any consideration therefor.

It also recites, that said Luke was indebted to Anne E. Brien, at the time of her death, in the sum of $4450, which on her death became due to Luke Tiernan Brien, her only child and heir at law.

It also recites, that said Luke "is indebted to divers other persons, residing in different parts of the United States of America, in a large amount of money in the aggregate, but the names of all the persons to whom he is so indebted, and the

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The prior right of the creditors of a firm to its effects cannot be impaired by any consideration having reference to the interests of the individual partners; and anything which defeats this right and hinders or delays such creditors in enforcing payment of their demands against the firm from the firm's property, is a violation of the statute and a fraud upon such creditors. *Schiele* v. *Healy*, 61 How. (N. Y.) Pr., 73.

A judgment against one partner, individually, is a lien upon real estate owned by the firm; but such lien is subject to the payment of the firm debts. *Johnson* v. *Rogers*, 15 Bank Reg., 1.

The preference of the separate creditors over the firm creditors, in the distribution of individual effects, can only be enforced in equity. The lien of a judgment for an individual debt does not take priority over that of a prior judgment against the same partner for a firm debt. *Gillaspy* v. *Peck*, 46 Iowa, 461.

A division of co-partnership property between the partners in proportion to their interests, for the purpose of protecting the property from seizure by the individual creditors of one of the partners, is not unlawful, and cannot be avoided as a fraud upon the individual creditors. By such a transaction the other partners do not acquire any of the property of the debtor, but only separate their own from his, so that their portion shall not be interfered with for his debt. But even if a fraud is perpetrated, the whole property does not become liable to seizure upon attachment at the suit of an individual creditor; nothing more than the debtor's interest in the property can, in any event, be liable. *Atkins* v. *Saxton*, 77 N. Y., 195, 199.

A transfer of the assets of the firm, for a *bonâ fide* consideration (not made in contemplation of dissolution or bankruptcy), in payment of the individual debt of one of the partners, with the consent of the other partners, —*held* good as against firm creditors. *Schmidlapp* v. *Currie*, 55 Miss., 597. S. P. *Case* v. *Beauregard*, 9 Otto, 119

amount due to each respectively, the said Luke Tiernan is now unable to specify particularly."

The deed then conveys said land to said Carroll in trust, to sell and convey the same in the manner therein specified, and after paying expenses, including a commission for his services, to remit the net proceeds of the first moneys arising from the sales, in bank checks or drafts, to Alexander Neill, of Maryland, "until he shall have remitted the sum of $15,000, to be paid by the said Alexander Neill to the creditors of the said Luke Tiernan, whose demands shall then have been ascertained; and if the demands so ascertained shall exceed the said sum of $15,000, the same shall be applied in part payment of each of said demands, in the ratio that each of said demands respectively shall bear to the whole sum to be so applied."

After said sum of $15,000 shall have been remitted, then the sum of $12,000 is to be remitted by said Carroll to such person as said Anne Tiernan may designate, which is to be invested for the sole and separate use of said Anne, as a compensation to her for relinquishing her dower in the land by the deed conveyed.

Then the sum of $4450, with interest from the 1st of January, 1841, is to be remitted by said Carroll in payment of the above-mentioned debt due to Luke Tiernan Brien.

"And after the last-mentioned sum shall have been remitted as aforesaid, all the residue of the moneys arising from such sales (after deducting the expenses and commissions as aforesaid) shall be remitted by the said Charles H. Carroll from time to time, as the same shall be received, to the said Alexander Neill, in the manner hereinbefore provided for the remission of the said sum of $15,000, and the same shall be applied by the said Alexander Neill to the payment of the debts due from the said Luke Tiernan to all the creditors of the said Luke, whose *demands shall then have been ascer- [*416 tained by the said Alexander Neill; and in case that the sum so to be applied shall be insufficient for the payment of all such demands, then and in this case the same shall be applied in part payment of each of said demands, in the ratio that each of said demands respectively shall bear to the whole sum to be so applied to that object; and in case the said sum shall be more than equal to the payment of such demands, then and in that case the residue thereof shall be paid by the said Alexander Neill to the said Luke Tiernan, his heirs, executors, administrators, or assigns."

The said Carroll, in pursuance of said deed, proceeded to make sale of various parts of the property thereby conveyed, and from time to time, from the 1st of March, 1841, to the

22d of April, 1844, remitted to said Neill, in various amounts, the whole sum of $15,000, provided to be paid in the first place to said Neill out of the net proceeds of sales as above mentioned. This sum increased in the hands of Neill, by interest and premiums on the drafts in which it was remitted, to $16,440.55.

Luke Tiernan was a partner in the commercial firm of Luke Tiernan & Son, of Baltimore, the only other partner therein being his son Charles Tiernan. This firm was dissolved previously to the death of Luke Tiernan, which occurred on the 9th of November, 1839, and after his death it was conducted under the same name by Charles Tiernan.

Luke Tiernan was also a partner in the commercial firms of Luke & Charles Tiernan, and Tiernan, Cuddy & Co., of New Orleans. The partners of the first-named firm were Luke and Charles Tiernan, and of the second, Luke Tiernan, Charles Tiernan, Calvin Tate, and James McG. Cuddy.

The firm of Tiernan, Cuddy & Co., failed in December, 1835, for a large sum of money. Charles Tiernan was the liquidating partner thereof, and was engaged from April, 1836, to May, 1842, in collecting the assets of the firm. He collected about $100,000, the whole of which, and a good deal more, he paid in satisfaction of the debts of the firm. Calvin Tate, one of the partners, applied for the benefit of the bankrupt law of the United States on the 18th of February, 1842, and obtained his discharge under said application. The amount of debts returned by him as due by Tiernan, Cuddy & Co. was $569,069.49, and the amount as due to said firm was $800,743.47.

On the 29th of May, 1845, the executors of Luke Tiernan, on an account then passed by them with the Orphans' Court of Baltimore County, had in hand a balance in cash to the amount of $506.91. They conjecture that, with this balance,
*417] debts may be collected and other assets may be realized, including *the entire real and personal property of said Luke, to the amount in all of about $30,000. None of this amount, however, so far as appears, was ever collected, except said sum of $506.91, and the entire estimate is merely conjectural.

The individual debts of Luke Tiernan, as proved and allowed in this case, amount to $31,586.25.

The partnership debts of all the firms in which Luke Tiernan was concerned as partner, as approved in this case, amount to $295,025.74.

In October, 1843, John D. Murrill, a citizen of the state of Virginia, and the Bank of New Orleans, filed their bill in equity

against Mr. Neill, claiming from him an account of his trust under the deed now described, and a distribution of any fund in his hands among the creditors of Mr. Tiernan. The bill was amended by making William T. Somerville a defendant, as executor, along with Mr. Neill, of Luke Tiernan.

The answer of Neill admits the receipt under the deed of $15,000, increased, by interest from investment, to $16,440.55; and this sum he asks may be distributed among the creditors of Mr. Tiernan who may under the trust have right to it. Testimony was taken to show the insolvency, and the debts and assets, of the partnership in New Orleans, and of Luke Tiernan. The separate estate of the latter in Maryland is shown to have been administered, leaving only $506 in the hands of the executors, and some good debts to be collected, and some unsalable stocks.

The court passed an order for notifying creditors of Luke Tiernan to file their claims, and under it a number of claims have been presented, partnership and individual, against Luke Tiernan. The individual amount to $31,586.25, the partnership to $295,025.74.

The matters being referred to an auditor to report an account upon the claims, he stated two accounts, one applying the fund to payment of only the individual creditors, the other to payment of them and of the partnership creditors *pari passu*.

Upon exceptions taken, the court determined that the individual creditors were to be preferred, and the funds of the trust should go to their satisfaction before any payments should be made to the partnership creditors.

The trustee was therefore directed to proceed to distribute and pay over the funds accordingly. From this decree, the complainants appealed to this court.

The case was argued by *Mr. Mayer* and *Mr. Johnson* (Attorney-General), for the appellants, and by *Mr. Brown* and *Mr. Meredith*, for the appellees.

*The counsel for the appellants, contending that they were entitled to share ratably with the individual creditors in the funds proceeding from the lands conveyed, submitted these propositions:— [*418

1. There is no rule at law, nor in equity, which gives separate creditors a priority of payment over joint creditors, out of separate estates; although the principle is well established that joint, that is (more properly) partnership, creditors are first to be paid out of partnership property. This principle is founded upon the consideration that each partner is interested in the

partnership fund, and concerned to see it applied for his exoneration by its paying the common liabilities; and it is pledged accordingly, not only for partnership debts, in favor of partnership creditors, but from each to the other partner for the indemnity of both. The prior right of partnership claims upon the partnership estate arises, therefore, from the nature of that estate, in reference to the rights of the partners; and does not grow out of any limitation of the rights or remedies of the partnership creditors. Such being the nature of the partnership fund, it is regarded, too, as under a prior lien in favor of the partnership creditors. The principle, then, which gives the priority is not restrictive, but is cumulative, in furnishing a security, by this preferred claim to the partnership property, in favor of partnership creditors. The rule contended for by the appellee has reference only to the marshalling of assets, not to the satisfaction, directly or ultimately, of the joint claims. It is a rule only "of convenience."

2. Whatever may be the rule as to the distinctive appropriation of separate and joint estates of debtors, it is believed to be clear from the authorities, that where there is no joint estate, or it is inadequate, or there are no solvent partners, the partnership creditors are admitted to dividends, with separate creditors, out of the separate estates.

3. Modern decisions in equity regard partnership claims, and satisfy them, as jointly and severally binding the partners. In this respect, equity follows the law, and would virtually make the property here, under that position, legal assets. The whole idea of separate claims having a priority upon separate estates, arose from the impression that the partnership claims should not be treated in equity as joint and several.

4. Whether the proceeds of sales under Mr. Tiernan's deed be regarded as legal or as equitable assets, the terms of the deed demand a distribution among all creditors, without preference to any class.

*419] 5. But those proceeds are to be regarded as legal assets, and *the partnership creditors can no more rightfully be excluded from them than they could have been denied, after judgment against all the partners, the privilege of levying an execution on the lands, if they had not been conveyed. So far as the deed provides for creditors generally, it does but what the law had ordained, in subjecting the lands to all creditor claims. Equity here must follow the law in applying the avails of this property. That is the true equity.

Under the first proposition, the following authorities were relied upon. 5 Cranch, 34; 5 Serg. & R. (Pa.), 78; Eden on

Bankruptcy, 169; 3 Ves., 238; 4 Id., 838, 437; 6 Id., 813, 9 Id., 118, 124, 125; *Ex parte Haydon*, 2 Bro. C. C., 5; 14 Ves., 447; 15 Id., 496; 17 Id., 210; 5 Johns. (N. Y.) Ch., 60, 74; 2 P. Wms., 500; 2 Russ., 191, 194, 196; 1 Har. & G. (Md.), 96; 8 Pet., 271; 4 Johns. (N. Y.) Ch., 525; 3 Madd., 229; *Buck's Cases in Bankr.*, 227; 2 Madd. Ch. Pr., 464; 3 Kent, 43, 64, 65; 8 Law Rep., 273, Judge Ware's Decision; Story on Partn., 363; *West* v. *Skip*, 1 Ves. Sr., 239.

Under the second, the cases from Vesey and 2 Bro. C. C., 5; 2 Madd., 464; 5 Serg. & R. (Pa.), 78, cited under the first proposition, were relied on.

Under the third proposition, 1 Story Eq., 626, § 676; 1 Myl. & K., 582; 1 Meriv., 539, 572; 2 Johns. (N. Y.) Ch., 508; 1 P. Wms., 682; 3 Ves., 238; 4 Id., 838; 1 Har. & G. (Md.), 96; 2 Russ. & Mylne, 495; 1 Keen, 219; 1 Gall., 371, 630; 2 Vern., 292; 2 Ves., 100, 371.

Under the fourth proposition, Ram. on Assets, 317 (8 Law Lib.); 1 Vern., 63, 101; 2 Id., 61, 763.

Under the fifth, 1 Vern., 63, 410, 411; 2 Id., 764; 1 Story Eq., 521, § 553; 22 Pick. (Mass.), 450, 454, 455.

The counsel for the appellees contended,—

1st. That the language of that clause in the deed of the 24th September, 1839, which directs that the first $15,000 remitted by the trustee shall be paid to "the creditors of the said Luke Tiernan," throws upon the appellants the *onus* of showing that the creditors of the partnership firms of Tiernan, Cuddy & Co., and L. & C. Tiernan were meant to be included. *Thomas* v. *Beynon*, 12 Ad. & Ell., 431.

2d. That, for the purpose of determining the meaning attached by the grantor to the language of the provisions of said deed, and to ascertain what he intended by the same, the court, by means of extrinsic evidence, will place itself in his situation, by inquiring into all the collateral facts and circumstances that can be made ancillary to those objects. Wigram's Extrinsic *Evidence, (2 Lib. of Law and Eq.,) Introductory Observations, § 9; the whole of Proposition V., with the notes, and especially §§ 61, 62, 71, 72, 73, 74, 77, 78, 79, 95, 96; the whole of Proposition VII., with the notes, and particularly §§ 150, 151, 152; General Conclusions, §§ 211, 212, 213, 214, 215. Broom's Legal Maxims, 262, 263, 294 (1 Lib. of Law and Eq.); Gresley's Evidence in Equity, 203; *Cheyney's case*, 5 Co., 68; *Altham's case*, 8 Co., 155; *Counden* v. *Clark*, Hob., 32; *Smith* v. *Jersey*, 2 Brod. & B., 473; *Doe* v. *Harvey*, 8 Bing., 239; *Gord* v. *Needs*, 2 Mees. & W., 129; *Hiscocks* v. *Hiscocks*, 5 Id., 367, 368; [*420

Allen v. *Allen*, 12 Ad. & Ell., 451; 1 Greenl. Ev., §§ 286, 287, 288, 290, 297; *Blackwell* v. *Bull*, 1 Keen, 176; *Doe* v. *Morgan*, 1 Cromp. & M., 235; *Shore* v. *Wilson*, 5 Scott, N. R., 1037, 1038; *Bradley* v. *Steam Packet Co.*, 13 Pet., 89; *Barry* v. *Combe*, 1 Id., 640; *Barkley* v. *Barkley*, 3 McCord (S. C.), 269; *Doe* v. *Roe*, Ga. Dec., Part I., 80.

3d. That the deed *per se*, without looking beyond it, or out of it, ought to be construed to include only the creditors of Luke Tiernan, on his own individual account. Broom's Legal Maxims, (1 Lib. of Law and Eq.,) pp. 120, 126, 127, 128, 140, 141, 150, 151; 1 Preston's Shep. Touch., ch. 5; 30 Law Lib., 150 *et seq.*

4th. If this construction be not correct, they will maintain that the money in question in this case, which consists of the $15,000 first mentioned in the deed, with the increase thereof, should be divided solely among the individual creditors, and that the partnership creditors of said Luke Tiernan, if embraced at all in said deed, are secured by the subsequent part thereof, which provides that the residue of the proceeds of sales shall be divided among *all* the creditors of said Luke.

5th. And if neither of said constructions shall be sustained by the court, they will further maintain that said Luke Tiernan, if all his debts, both individual and partnership, be taken into consideration, made said deed with reference to the rule common both to courts of equity and bankruptcy, that individual creditors shall first be paid out of individual property, and partnership creditors out of partnership property, and that all the property conveyed by said deed, being the individual property of Luke Tiernan, must be applied in the first instance to the payment of his individual debts.

They relied on the decree of Lewis H. Sanford, Assistant Vice-Chancellor of the First Circuit of the state of New York, made with reference to this deed, in the case of *Slatter* *421] v. *Carroll*, 2 Sandf. (N. Y.) Ch., 578; Cary on Part., 220, (5 *Law Lib.); Id., 296; Gow on Part., 386; Story on Part., §§ 363–366, 376; 3 Kent, 64, 65 (4th ed.); Collyer on Part., 337–341; 3 Bland (Md.), 356; *McCulloh* v. *Dashiell*, 1 Har. & G. (Md.), 97; *Pierce* v. *Tiernan*, 10 Gill. & J. (Md.), 253; *Tuckers* v. *Oxley*, 5 Cranch, 44, 45; *United States* v. *Hack*, 8 Pet., 271; *Wilder* v. *Keeler*, 3 Paige (N. Y.), 171; *Payne* v. *Matthews*, 6 Id., 19; 1 Story Eq., § 675; Eden on Bankruptcy, 169 *et seq.*, 34 Law Lib.

Mr. Justice DANIEL delivered the opinion of the court.

The original bill in this case having been framed upon a palpable misapprehension of the position of the parties, and

of the facts connected with and entering into their rights or their obligations, reference to that bill beyond this remark is deemed unnecessary. The object of the amended bill filed by the complainants on behalf of themselves and others, creditors of the mercantile houses of Luke Tiernan and Charles Tiernan of Baltimore, and of Tiernan, Cuddy, & Co., of New Orleans, is to procure an appropriation to those creditors of the sum of $15,000, remaining in the hands of the defendant Alexander Neill, and derived to him from Charles H. Carroll, the trustee in the deed from Luke Tiernan, filed as an exhibit with the answer of Neill in this cause. This controversy depends, first, upon the construction of those clauses of the deed above mentioned, which direct the payment by the trustee to Alexander Neill, and the application by the latter of the sum so paid, and, secondly, upon the operation of the rules of law, as controlling such application in reference to the rights of the separate creditors of Luke Tiernan, and of the joint creditors of the firms of Luke & Charles Tiernan, and of Tiernan, Cuddy & Co.

In other words, whether the separate creditors of Luke Tiernan have a prior right of satisfaction from the subject of the trust constituting the separate private estate of said Tiernan, or have the right to claim against that separate estate *pari passu* only with the several creditors of the mercantile houses of which Luke Tiernan was a partner. The facts of this case are few and simple, and are scarcely in any respect controverted; the cause turns, as has already been remarked, upon the construction of the deed, and upon the rules of equity as applicable to the position of the grantor, in relation to the different classes of his creditors, at the period of its execution. The language of the deed, as indicative of the intention of the grantor, will in the first place be adverted to. And in considering this language, it may be remarked, that it nowhere speaks of debts due from Luke Tiernan, as a member of the firms of Luke & Charles Tiernan, or of Tiernan, Cuddy, & Co., nor mentions *nor alludes to those [*422 firms, nor to any other mercantile firms whatsoever. This deed recites the facts of the relinquishment by Mrs. Tiernan of her dower right in a large amount of property previously sold by her husband, and of her consent to a similar relinquishment in future sales to be made by the trustee, Carroll; it recites also a debt due from the grantor to Mrs. Anne E. Brien, deceased, which was still unpaid, and was due and owing to her son, Luke Tiernan Brien. It then proceeds to declare,—"That whereas the said Luke Tiernan is indebted to divers other persons, residing in different parts of the

United States, in a large sum of money in the aggregate, but the names of all the persons to whom he is indebted, and the amounts due to each respectively, the said Luke Tiernan is now unable to specify particularly. And whereas the said Luke Tiernan is desirous of conveying the lands hereinafter described, in trust that the same shall be sold, and the proceeds thereof applied in the manner hereinafter particularly specified." The deed then, after directing a sale by the trustee, provides, that he shall remit from time to time, as the same shall be received, "to Alexander Neill of Maryland, and payable to his order, of the first moneys arising from such sales, until he shall have remitted the sum of $15,000, to be paid by the said Alexander Neill to the creditors of the said Luke Tiernan whose demands shall then have been ascertained; and if the demands so ascertained shall exceed the said sum of $15,000, the same shall be applied in part payment of each of the said demands, in the ratio that each of said demands shall respectively bear to the whole sum $15,000, so to be applied." The deed then provides, out of further remittances arising from sales to be made by the trustee, for the payment of $12,000 to Mrs. Tiernan, in compensation for her right of dower; and next, for the payment of the debt due to the son of Mrs. Anne E. Brien, and then declares, that after the last-mentioned sum (i. e. the sum due to Mrs. Brien or to her son) shall have been paid, all the moneys arising from such sales (after deducting expenses, &c.) shall be remitted by the trustee to the said Neill, and the same shall be applied by the said Neill to the payment of the debts due from the said Luke Tiernan *to all* the creditors of the said Luke, whose demands shall then have been ascertained by the said Alexander Neill; "and in case that the sum so to be applied shall be insufficient for the payment of all such demands; then, and in this case, the same shall be applied in part payment of each of said demands, in the ratio that each of said demands respectively shall bear to the whole sum to
*423] be so applied to that object; and in case the said sum shall be more than equal to the payment of *such demands, then, and in that case, the residue thereof shall be paid by the said Alexander Neill to the said Luke Tiernan, his heirs," &c.

We have already adverted to the circumstance, that the grantor in this deed has nowhere alluded to any mercantile concern with which he was associated; that he was disposing of a subject confessedly his own separate property; that he has not said, that whereas Luke Tiernan & Son, or Tiernan, Cuddy & Co., but that Luke Tiernan, was indebted to Mrs.

Tiernan and to Mrs. Brien, and to divers other persons residing in different quarters of the country. This would not be the language of a merchant, (still less of a practiced and extensive merchant,) when intending to designate the firm of which he makes a part. On such occasions he never mentions himself individually, unless he intends expressly to distinguish between himself and his house, and would always be so understood by established mercantile acceptation. And again, if, in the construction of this deed, the name of Luke Tiernan is to be taken as synonymous with Luke Tiernan & Son, and Tiernan, Cuddy & Co., we should be driven to the conclusion that these several firms were indebted to Mrs. Tiernan in consideration of her relinquishment of her dower in her husband's estate, and to Mrs. Brien for the private debt due to her,—for all these creditors are grouped in the same category. Their claims originate in the same source,—in the obligations of Luke Tiernan. The language of the deed is, that *Luke Tiernan* is indebted to Mrs. Tiernan, and to Mrs. Brien; and the same Luke Tiernan it is who is also indebted to divers other persons residing in different parts of the United States. Such a construction of the deed involves, we think, a violation of the plain meaning of the terms of the instrument, and leads to confusion and absurdity.

It has been insisted for the appellants in this case, that the admission by the grantor of a large amount of claims against him, of the diversity of the residence of his creditors, and of the inability on his part at once to designate those creditors and their demands, should be received as proof that the deed was never intended to be limited to the private creditors of the grantor, who, it is contended, must, as well as the extent of their claims, have been known; but was designed to embrace all his partnership liabilities. We have just stated that such an interpretation of the deed is inconsistent with the meaning of its language. But if we look beyond the deed, to the position of the parties at the time of its execution, is there any probability arising from that position, which can justify the conclusions *urged in this respect for the appellants? The grantor in this deed appears to have [*424 been at one time the possessor of great wealth; the deed made an exhibit in this case shows that he was the possessor of an unusual extent of property. It is almost certain, too, from the character and situation of the subject of this conveyance, as well as from other circumstances disclosed by the record, that its owner must have been the proprietor of many other constituents of a large estate, both within and without the city and state of his residence. That a man thus situated

should necessarily be engaged in a variety of transactions; should employ numerous agents; that many of his transactions, both as to persons and contracts, should be conducted by agents; that his knowledge with respect to persons and undertakings should in their detail be dependent on information to be derived from agents thus employed,—are circumstances, in our view, falling within the range of daily experience, and such as not only may explain the language of an instrument intended to embrace the transactions of one so situated, but which in fact render such language proper, in order to bring it within the bounds of experience and truth. The daily habits of one so situated must imply, to some extent, an ignorance of the precise detail of all that may be consequent upon them. We think it natural, (nay, with a due regard to truth, inevitable,) that one so situated, if called upon on an emergency, should admit his inability to enumerate all that he had done,—all that he had authorized to be done through others,—and every consequence which might flow from the one or the other. The language of Mr. Tiernan we consider, therefore, as not more comprehensive than was appropriate to embrace his private liabilities. The debts due to his wife and to Mrs. Brien were strictly domestic obligations, necessarily within his knowledge; were regarded as of a peculiarly sacred character; and therefore were provided for, exempt from the contingency of an ultimate insufficiency of funds. But even these claims, however sacred they may have been deemed, were not permitted absolutely to precede a contribution at least to other creditors whose condition might be known; but they have been postponed to these *pro tanto*. The language of that portion of the deed which, after the payment directed to be made to Mrs. Tiernan and to Luke Tiernan Brien, and after distribution of the first fifteen thousand dollars received from the trustee, directs the application of the subsequent proceeds of the trust subject to all the creditors of the grantor then ascertained, and, in the event of a surplus, the payment of that surplus to the grantor, has
*425] been earnestly pressed on our attention. It has been argued upon *this provision of the deed, either that it is expressive of the intention of Luke Tiernan to let in all his creditors, social as well as individual, or that it is fraudulent, as interposing a hindrance on one or the other class, or on both the classes of his creditors, by an attempt to retain the proceeds of the land, in opposition to their rights. We cannot yield to this argument the ends it was designed to accomplish. We think that the terms of this latter provision, so far from enlarging the meaning of the former, so as to let

in upon the trust subject the creditors of the firms before mentioned, tend rather to strengthen the limit presented by the former provision when standing alone. For although the distribution of the money to be received by Neill is to be made amongst *all* the creditors, they are still the creditors of the said Luke Tiernan before spoken of, and the creditors of no other person. This mode of expression, coming from an individual practiced in the habits and language of merchants, we regard as a confirmation of the intention previously expressed, rather than as proof of a departure from that intention. Next, as to any evidence of fraud resulting from the direction to pay over to the grantor in the deed any surplus which might remain after satisfying the separate creditors; we can perceive no proof of fraud, no attempt to hinder or delay the creditors in this direction. Nothing is more probable than that Luke Tiernan might have considered the effects of Luke Tiernan & Son and of Tiernan, Cuddy & Co., represented to be of a large amount, as adequate to meet the joint responsibilities of those firms; or, at any rate, he might have insisted upon his right to refer the partnership creditors to the partnership funds in the first instance, and, until these should be shown to be insufficient, to retain possession of his separate private estate. The argument then appears to be defective in either aspect in which it is applied.

The second principal position assumed for the appellant is this: that, conceding the fifteen thousand dollars in controversy to have been ever so clearly appropriated by Luke Tiernan to his separate creditors, still, under principles of equity, such an appropriation cannot be maintained; but that those principles authorize the partnership creditors of Tiernan & Son, and of Tiernan, Cuddy & Co., to charge that fund *pari passu* with the separate creditors of said Tiernan.

The rule in equity governing the administration of insolvent partnerships is one of familiar acceptation and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally, received. This rule, *with one or two eccentric variations in the English practice which may be noted hereafter, is believed to be identical with that prevailing in England, and is this:—That partnership creditors shall in the first instance be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of [*426

partnership debts, until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule, to stay the hand of innovation at this day; at least, under any motive less strong than the most urgent propriety.

This rule may be traced back in England, with certainty, to the cases of *Ex parte Crowder*, in 2 Vern., 706, (in 1715,) and of *Ex parte Cook*, 2 P. Wms., 500, (in 1728,) nearly a century and a half since. It was affirmed by Lord Hardwicke in *Ex parte Hunter*, in 1 Atk., 228, (in 1742,) and continued unchanged until the year 1785, when a material innovation was made upon it by Lord Thurlow, in the case of *Ex parte Hodgson*, 2 Bro. Ch., 5. By the decision last mentioned, the established practice then of sixty years was so changed, and the distinction between joint and separate creditors so broken up, that the former were permitted to come in, and to receive dividends *pari passu* with the latter, from the separate estate.

This change led to the practice of filing a bill on behalf of the separate creditors, to restrain the order in bankruptcy whenever there was a joint estate, and by this means the rights of the joint and separate creditors on their respective funds were maintained; a proceeding which could rest on no other foundation, than the peculiar equities of these different parties with respect to the funds with which they had been respectively connected. In consequence of the inconvenience of Lord Thurlow's rule, and of the injustice it was thought to involve, Lord Loughborough re-established the practice that had so long previously existed, with the single modification of permitting the joint creditors to prove under a separate commission; but denying to them any right to dividends, until after the separate creditors were satisfied. The reasoning of his Lordship, as going to show that his decision is founded in pure principles of equity, is peculiarly forcible. Speaking of
*427] the rule of Lord Thurlow, he says,—"The difficulty that has struck me upon *it is, that what I order here sitting in bankruptcy, I shall forbid to-morrow sitting in chancery; for it is quite *of course* to stop the dividend upon a bill filed. The plain rule of distribution is, that each estate shall bear its own debts. The equity is so plain, that it is of course upon a bill filed. The object of the commission is to distribute the effects with the least expense. Every order I make to prove a joint debt on a separate estate, must produce

a bill in equity. It is not fundamentally a *just* distribution, nor a convenient distribution. Every creditor of the partnership would come upon the separate estate. The consequence would be, the assignees of the separate estate must file a bill to restrain the dividend upon all these proofs, and make the partners parties. But there is another circumstance. It is a contrivance to throw this upon the separate estate." Again his Lordship says,—"It is not stated as a case where there are no joint funds. Here it is only that there are two funds. Their proper fund is the joint estate, and they must get all they can from that first. I have no difficulty in ordering them to be permitted to prove; but not to receive a dividend." This doctrine of Lord Loughborough, deduced, as he tells us, not less from fundamental principles of equity, than from convenience in the administration of bankrupts' estates, appears to have been followed in England ever since. The numerous cases chiefly before Lord Eldon going to sustain this position, would, if quoted, unnecessarily encumber our opinion; they are collected in note 1 to the case of *Elton, Ex parte*, 3 Vesey by Sumner, p. 242. It may be proper in this place to mention the two departures permitted by the Court of Chancery in England from the general rule pursued by that court, which departures were adverted to in a previous part of this opinion. The first is presented in the instance in which the *petitioning creditor*, though a joint creditor, is permitted to charge the separate effects *pari passu* with the separate creditors, because, as it is said, his petition, being prior in time, is in the nature of an execution in behalf of himself and the separate creditors. The second is that in which there are no joint effects at all. In this last instance it is said that the joint creditors may come in for dividends *pari passu* on the separate effects; though if there be joint effects, though of the smallest possible amount, this privilege would not be allowed. These exceptions it seems difficult to reconcile with the reason or equity on which the general rule is founded; they are but exceptions, however, and cannot impair that rule. They do not, for aught we have seen, appear to have been recognized by the courts of this country. The case of *Tucker* v. *Oxley*, 5 *Cranch, 34, was a case at law, and [*428 the court in that case, whilst they admitted the joint creditors to prove and to receive dividends against the separate estate, explicitly recognized the authority of *Ex parte Elton*, and the power and the duty of a court of chancery, upon application thereto, to prevent the diversion of the separate fund. The latter exception above referred to was considered by the Court of Appeals of Maryland, in the case of *McCulloh* v. *Dashiell*,

1 Harr. & G. (Md.), 97, and by that court expressly repudiated.

The doctrine upon this question of distribution, as illustrated both in the English and American decisions, will be found to be ably treated in the case of *Murray* v. *Murray*, 5 Johns. (N. Y.) Ch., 72 *et seq.*; and by Archer, Justice, in the case of *McCulloh* v. *Dashiell*, in 1 Harr. & G., pp. 99 to 107; and the authorities, both English and American, are collated in a learned note in the third volume of Kent Commentaries, beginning on p. 65 of that volume.

The proper conclusion from these authorities we deem to be this, as is stated also by Justice Story in his treatise on Partnership, p. 376, where he says,—"It is a general rule, that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over separate debts of the bankrupt; and so, in the converse case, the separate debts are primarily payable out of the separate effects, and possess a like preference; and the surplus, only after satisfying such priorities, can be reached by the other class of creditors."

Upon a full consideration of this cause, we are of the opinion that, upon either ground of objection urged to the decree of the Circuit Court, that decree should be affirmed, and it is hereby accordingly affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

*DANIEL L. GROVE, APPELLANT, *v.* JOHN McP. BRIEN, ROBERT GILMOR, WILLIAM FOWLE, WILLIAM H. FOWLE, AND GEORGE D. FOWLE, TRADING UNDER THE FIRM OF WILLIAM FOWLE & SONS, DEFENDANTS.

Cross Suit.

ROBERT GILMOR, COMPLAINANT, *v.* DANIEL L. GROVE, JOHN McP. BRIEN, WILLIAM FOWLE, WILLIAM H. FOWLE, AND GEORGE D. FOWLE, TRADING UNDER THE FIRM OF WILLIAM FOWLE & SONS, DEFENDANTS.

Where a manufacturer upon the upper waters of the Potomac shipped five hundred kegs of nails to Alexandria, taking from the master of the canal-boat a receipt saying that the nails were "to be delivered to Fowle & Sons in Alexandria, for the use of Robert Gilmor of Baltimore," and on the same day sent a letter to the consignees, advising them that the goods were consigned for the use of Gilmor, such delivery and bill of lading operated as a transfer of the legal title to Gilmor, who was in fact the consignor.

The effect of a consignment of goods, generally, is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage.[1]

Therefore, the kegs of nails in the hands of Fowle & Sons were not subject to an attachment by the creditors of the manufacturer; nor had Fowle & Sons any valid lien upon them for previous advances to him. The title to the nails had passed to Gilmor before they came into the possession of Fowle & Sons.

In this case the manufacturer acted *bona fide*, in the transfer of the goods, for the purpose of securing a pre-existing debt to Gilmor. This being so, there was no necessity for Gilmor's expressing his assent to the transfer, in order to the vesting the title. The manufacturer was a competent witness.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia and County of Alexandria.

It was a controversy respecting the right to certain kegs of nails, which were in the hands of William Fowle & Sons, in Alexandria.

On the 14th of March, 1848, the following was the position of the several parties who had any concern in the matter.

John McPherson Brien carried on an extensive iron concern upon the waters of Antieatam Creek, in Maryland, near the Potomac River above Harper's Ferry. He was indebted to Robert Gilmor of Baltimore, to Daniel L. Grove of Alexandria, and to William Fowle & Sons of the same place. To the last-mentioned house he had been in the habit of sending nails from the foundry, and upon the preceding 21st of February had written the following letter:

[1] DISTINGUISHED. *The Bark Carlotta*, 9 Ben., 16. CITED. *Lawrence v. Minturn* 17 How., 107; *The Bermuda*, 3 Wall., 553; *Halliday* v. *Hamilton*, 11 Id., 564; *The Vaughan and Telegraph*, 14 Id., 266.

"*Antietam, February* 21, 1843.

"MESSRS. WM. FOWLE & SONS:—

*430] "Gentlemen,—Your account of sales, &c., has been examined *and found correct, and charges for your commission, &c., made in my books accordingly.

"The water I learn will be put into the canal in a day or two, when I shall embrace the first opportunity to forward you the nails you have ordered.

"Yours, most respectfully,

"JNO. McP. BRIEN."

In this state of affairs, Brien made a shipment by one of the canal-boats, and took the following receipt:—

"Received, March 14, 1843, of John McP. Brien, 500 kegs of nails, to be delivered to William Fowle & Sons, Alexandria, D. C., for the use of Robert Gilmor, Esq., Baltimore, in good order.

"GEORGE H. SHARPLESS,
For ISAAC SHARPLESS."

Upon the same day the following letter was written, which, it appeared by the testimony, was not mailed at Mr. Brien's post-office, but brought down the canal by the boatman, and mailed at Georgetown, on the 20th. It was received by Fowle & Sons on the 21st.

"To MESSRS. WM. FOWLE & SONS:—

"Gentlemen,—We have this day shipped on board of Capt. Sharpless' boat, and consigned to you, for the use of Robert Gilmor, Esq., Baltimore, 500 kegs nails, viz., 27 3*d.*, 34 4*d.*, 68 6*d.*, 99 8*d.*, 107 10*d.*, 58 12*d.*, 22 20*d.*, and 17 30*d.* nails; 22 2*d.*, 7 8*d.*, and 15 10*d.* brads; 10 8*d.* and 12 10*d.* fencing, which we hope will arrive in good order. You will please pay Capt. Sharpless his freight, and oblige yours, respectfully,

"JNO. McP. BRIEN,
Per JAS. S. PRIMROSE.

"*March* 14, 1843."

Postmarked, "Georgetown, D. C., March 20."

Upon the preceding 23d of January Grove had filed a bill (the origin of all these legal proceedings) against Brien and Fowle & Sons, stating that Brien was indebted to the complainant in the sum of $1089.50, and praying that an attachment might issue against his funds and effects in the hands of Fowle & Sons. As soon as the nails arrived, viz., on the 20th of March, the marshal served the attachment and subpœna.

It may be here stated, that Gilmor obtained leave of the court to be made a defendant, and afterwards filed his answer and cross-bill.

*It is not necessary to state the progress of the suit through all its details. The parties all answered, and much testimony was taken, including that of Brien, which was objected to by the counsel for Grove. Proper parties were also made in place of some who had died. [*481

Fowle & Sons in their answer set forth their previous dealings with Brien, the letter (above inserted) of the 21st of February, and claimed that Brien was indebted to them on account of prior transactions, for which balance so due they had a lien on the nails.

The answer of Gilmor, and his cross-bill, state substantially the same facts, and, after referring to the attachment of the nails in controversy by Grove, say,—That John McP. Brien was indebted to Robert Gilmor, (besides other large indebtedness,) in the amount of a draft for $4,405.40, which was drawn by Brien on Gilmor and by him accepted, and at maturity paid by Gilmor, at the request and solely for the use of Brien. That previous to the shipment of the said nails, it was agreed between Brien and Gilmor, that Brien should ship to Gilmor the 500 kegs of nails, on account of, and to be applied in part liquidation of, such pre-existing debt.

It then proceeded to state the shipment, and claimed the nails as his property.

The answer of John McP. Brien to the original and cross-bills neither admits nor denies his indebtedness to Grove, as charged in his original bill, but calls for proof. He states his indebtedness to Gilmor, as alleged in the cross-bill, and admits that, according to a previous agreement between himself and Gilmor, and in consideration of such pre-existing indebtedness, he shipped the 500 kegs of nails in controversy, on the 14th of March, 1843, to the care of Wm. Fowle & Sons. That by letter dated the 14th of March, 1843, he advised said Wm. Fowle & Sons, that the said nails, a particular description of which is contained in the letter, were forwarded to them, for the use of Robert Gilmor, of Baltimore, and also inclosed them the receipt or bill of lading of the common carrier, to whom the said nails were delivered, which expressed that the same were shipped for the use of Robert Gilmor, and denies all fraud, combination, &c.

Grove answered the cross-bill, stating his ignorance generally of the facts, calling for proof, and charging that the consignment for Gilmor's use, if made, was fraudulent, &c., &c.

The result of the evidence in the suit may be stated to establish the debt of Brien to Gilmor, to Grove, and to Fowle & Sons, and the question was which creditor had the preference. The account of the sale of the nails was thus presented by Fowle & Sons.

*432] *It will be perceived that their prior debt is not brought into the account.

"Sales 500 casks nails, received from the Antieatam Iron-Works, for account and risk of whom it may concern.

"*Account of the sale of the nails by William Fowle & Sons.*

1845.			
Nov. 8.	R. Crupper, 100 casks, 10,000lbs. at $4\frac{1}{8}$, 6 months' credit, . .	$ 412.50	
1846.			
Oct. 27.	James Green, 400 casks, 40,000lbs. at $3\frac{1}{2}$, 6 months' credit, . .	1,400.00	
			$1,812.50
	Charges.		
1848.			
Mar. 18.	Paid freight on 500 kegs nails,	$75.00	
	Interest on $75 till sales are due,	17.54	
	Wharfage, $5; drayage, $3.75,	8.75	
	Storage, at $\frac{1}{4}$ cents per cask per month, ...	152.25	
	Labor, receiving, piling, and delivering, ...	5.00	
	Cooperage, ...	4.25	
	Fire Insurage, 5.100 per $100 a month and policy, $1, . .	42.00	
	Commission and guarantee, 6 per cent., ...	108.75	
			413.54
	Net proceeds average cash, February 7–10th, 1847, ...		$1,398.96

E. E.

"Wm. Fowle & Sons.

"*Alexandria, October 28th*, 1846."

On the 31st day of October, 1846, the Circuit Court passed the following decree.

"*Final Decree.*

"And now here, at this day, to wit, at a court continued and held for the district and county aforesaid, the 31st day of

October, 1846, came the parties aforesaid by their solicitors, and these causes being set for hearing, and coming on to be heard this 31st day of October, 1846, upon the original, amended, and cross-bills, demurrer, answers, general replication, depositions, exceptions, agreements of counsel, interlocutory decrees and orders, and other papers, and it appearing to the court that all the parties defendant to said original, amended, and cross-bills *had duly answered [*433 the same, and the arguments of counsel being heard, the court doth order, adjudge, and decree, that the amount of sales by the defendants, William Fowle & Sons, of the nails in controversy, made under an order in these causes of May term, 1844, not having been excepted to, be and the same is hereby confirmed. And the court proceeding first to decide upon the original bill filed by the complainant, Daniel L. Grove, doth adjudge, order, and decree, that the resident defendants, William Fowle & Sons, had not, at the filing of the said original bill, or at any time since, in their hands any property, effects, or money belonging to the said non-resident defendant, Jno. McP. Brien; and do further adjudge, order, and decree, that said original bill be dismissed, and that the said Daniel L. Grove do pay to the defendants thereto their costs in that behalf expended.

"And the court proceeding now to consider and decide upon the cross-bill, filed by the said Robert Gilmor in this cause, doth adjudge, order, and decree, that the said Robert Gilmor recover of the said John McP. Brien the sum of four thousand four hundred and five dollars and forty cents, the amount of the draft in the said cross-bill mentioned, with interest thereon from the 4th day of March, 1843, till paid; to be credited, however, by the sum of one thousand eight hundred and twelve dollars and fifty cents, as of the 14th day of March, 1843; the said sum of $1812.50 being the gross amount of the sales of the said five hundred kegs of nails, as shown by the account of sales of the said William Fowle & Sons above mentioned; and the court doth further order and decree, that the said William Fowle & Sons, out of the said one thousand eight hundred and twelve dollars and fifty cents, the proceeds of the sales of said nails in their hands, retain the sum of four hundred and thirteen dollars and fifty-four cents, in discharge and payment of the freight on the shipment of said nails, for storage, insurance, commission on sales, and the other items of charge against the said nails set forth in their said account of sales; and the court doth further adjudge, order, and decree, that the said William Fowle & Sons are not entitled to any lien on the said nails, or their proceeds, for the

sum of $334.60 claimed by them to be due as a general balance of account on previous transactions between them and the said John McP. Brien. The court doth further adjudge, order, and decree, that William Fowle, William H. Fowle, and George D. Fowle, composing the firm of William Fowle & Sons, pay over to the said Robert Gilmor the sum of one thousand three hundred and ninety-eight dollars and ninety-six cents, being the balance of the sales of the *484] *said nails in their hands, after deducting the said sum of $413.54 in manner aforesaid. And the court further adjudge, order, and decree, that the said Robert Gilmor recover of the defendants to said cross-bill his cost against them in that behalf expended.

"From which decree the complainant, Grove, in the original bill, and a defendant in the cross-bill, prays an appeal to the Supreme Court of the United States, which is granted, upon his giving bond and security in the sum of $2500, to be approved by the court or one of the judges thereof."

Upon this appeal, the case came up to this court.

It was argued by *Mr. Davis*, for the appellant, and *Mr. Francis L. Smith*, and *Mr. Meredith*, for the appellee.

The points raised by *Mr. Davis*, upon which the decision of the court turned, were the following:

If the deposition of Brien be admitted, still, on consideration of the whole evidence, the case of the answer and cross-bill is not proved.

(*a.*) The deposition is silent as to the alleged "previous agreement;" nor is any communication with Gilmor prior to the attachment shown.

(*b.*) The statement of the consideration is defective,—as in the cross-bill,—being merely his drawing on Gilmor, who accepted and paid the draft; "in consideration of which draft and other indebtedness," &c.

5. He then states, 1st, that he shipped 500 kegs of nails to Fowle & Sons, for use of Gilmor; 2d, that he took the annexed receipt; 3d, that the letter of March 14, 1843, was written by his authority. What that letter contained does not appear. If it be supposed to be the one produced by Fowle & Sons, then,—

1. It is not proved, and so cannot be read against any but Fowle & Sons.

2. If it be read against the complainants, it did not reach Fowle & Sons till after the attachment, and was not mailed till the day of the attachment.

It is not shown that the receipt ever left Brien's posses-

sion prior to the attachment or prior to his deposition. 9 Leigh, 181.

It is submitted that these facts, if believed, do not amount to a transfer of the title to the nails to Gilmor, prior to the attachment. *Tiernan* v. *Jackson*, 5 Pet., 597–599; *Williams* v. *Everett*, 14 East, 582; *Grant* v. *Austen*, 3 Price, 58; *Scott et al.* v. *Porcher*, 3 Meriv., 652, 663, 664; Story on Agency, § 377, note 3; *The Frances, French's Claim*, 8 Cranch, 359, *363; 3 Cond. R., 224; and *Dunham and Randolph's claim*, 8 Cranch, 354, 358; 3 Cond. R., 222, 223; *The Constantia*—Henrickson, 6 Rob. Adm., 321; Abbott on Ship., 328, 329, (5th Am. ed.) § 6; *The Venus*, 3 Cond. R., 181 (note 2); 2 Kent's Com., 582, 583, note *a* (3d ed.); 3 Barn. & A., 321. [*435

The receipt is not a bill of lading; or if it be one, the mere taking it does not change the property, nor the mere indorsement, without delivery of it. Abbott on Ship., 329, 330; *Mitchel* v. *Ede*, 3 Perry & D., 513; S. C., 11 Ad. & Ell., 888; 1 Bos. & P., 563; 1 Pet., 386.

But, in fact, the deposition shows that these nails were consigned generally to Fowle & Sons on their order; that the consignment for use of Gilmor is an afterthought, to cover the property from attachment, and a device frequently resorted to by Brien for such purposes; and that Brien's deposition is unworthy of credit.

The counsel for the appellee, after examining the evidence to prove that the nails were shipped by Brien to pay a pre-existing debt to Gilmor, made the following points.

If, then, as we insist, the evidence just alluded to proves that the nails were shipped under a special contract between Brien and Gilmor, in consideration of a pre-existing debt, due from the former to the latter, they became the property of Gilmor, on the 14th day of March, 1843, and are not liable to the lien of an attaching creditor, and on this ground the attachment of Grove must fail. Story on Agency (ed. 1839), § 362, and cases cited in note 2; *Weymouth* v. *Boyer*, 1 Ves., 416; *Coxe et al.* v. *Harden et al.*, 4 East, 211; *Burn* v. *Carvalho*, 4 Myl. & C., 690; *Wood* v. *Roach*, 2 Dall., 180; 1 Yeates, (Pa.), 177.

In view of these positions, we further submit, that immediately upon the receipt of the nails by Sharpless, the common carrier, and his signing the bill of lading, expressing on its face that they were to be delivered to Wm. Fowle & Sons, for the use of Robert Gilmor of Baltimore, the absolute title to the nails vested in Gilmor, and their delivery to Sharpless, the

carrier, operated in law as a delivery to Gilmor. The rule is the same whether the goods be sent from one inland place to another, or beyond sea. Holt on Shipping, 359; Story on Agency, § 361, and cases there cited; 2 Kent Com. (ed. 1847), part 5, p. 499; *Smith* v. *Bowles*, 2 Esp. Cas., 578; *Atkin* v. *Barnwick*, 1 Str., 165; *Evans* v. *Martlett or Martell*, 1 Ld. Raym., 271, and also reported in 12 Mod., 156, and in 8 Salk., 290, which is strongly analogous to the case at bar; *Dawes* v. *Peck*, 8 T. R., 330; *Allen* v. *Williams*, 12 Pick. (Mass.), *297; *Buffington et al.* v. *Curtis et al.*; 15 Mass., 528, and cases there cited; *Ludlowe* v. *Bowne*, 1 Johns. (N. Y.), 15; *Potter* v. *Lansing*, Id., 215; *Summeril* v. *Elder*, 1 Binn. (Pa.) 106; *Griffith* v. *Ingledew*, 6 Serg. & R. (Pa.), 429; *King* v. *Meredith*, 2 Campb., 639; *Copeland* v. *Lewis*, 2 Stark. N. P., 33; *Howland* v. *Harris*, 4 Mason. 502.

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The letter of advice from Brien to Wm. Fowle & Sons was a declaration of trust, and an irrevocable appropriation of the nails for the use of Robert Gilmor. *Walter et al.* v. *Ross et al.*, 2 Wash. C. C., 288; *Sharpless* v. *Welch et al.*, 4 Dall., 279; *Row* v. *Dawson*, 1 Ves. Sr., 331; *Stevenson* v. *Pemberton*, 1 Dall., 4; *Corser* v. *Craig*, 1 Wash. C. C., 424; 2 Story Eq. Jur., 1044, 1045.

The letter of advice to Fowle & Sons, the consignees, connected with the execution of the bill of lading and the delivery to the carrier for the use of Gilmor, amounts to such an assignment and transfer of the property in the nails to Gilmor, or to his use, as to protect them effectually against the claims of any attaching creditor. They amount to an order drawn on the whole fund. *Mandeville* v. *Welch*, 5 Wheat., 277–286; Story Conflict of Laws, p. 324, § 396; Bac. Abr. (Gwillim's ed. 1846), 381, and cases there cited; 2 Kent. Com. (ed. 1847), 548, 549; *Lickbarrow* v. *Mason*, 2 T. R., 63; *Nathan* v. *Giles*, 5 Taunt., 558; *Meyer* v. *Sharpe*, Id., 79; S. C., 1 Marsh., 233; *Wright* v. *Campbell*, 4 Burr., 2051; *Cuming* v. *Brown*, 9 East, 506; *Newsom* v. *Thornton*, 6 Id., 16; *Gardner* v. *Howland*, 2 Pick. (Mass.), 599; *Peters* v. *Ballistier*, 3 Id., 495; *Hodges* v. *Harris*, 6 Id., 359; *Rowley* v. *Bigelow*, 12 Id., 307; *Dawes* v. *Cope*, 4 Binn. (Pa.), 258; *Chandler* v. *Belden*, 18 Johns. (N. Y.), 157; *Bholen et al.* v. *Cleveland et al*, 5 Mason, 174; *Wilmshurst* v. *Bowker*, 7 Man. & G., 882; *Conard* v. *Atlantic Ins. Co.*, 1 Pet., 419; *Wakefield* v. *Martin*, 3 Mass., 558; Holt on Shipping, p. 362, § 4, p. 365, § 8, p. 378, § 15, p. 374, § 16, p. 377, § 19.

Notice of acceptance by Gilmor was not necessary, the goods having been shipped to pay a precedent debt. *Ander*

son v. *Van Alen*, 12 Johns. (N. Y.), 343; *Wheeler* v. *Wheeler*, 9 Cow. (N. Y.,) 34; *Holland* v. *Dale*, 1 Ala., 263.

The attaching creditor can occupy no better footing than the absent defendant. *Wilson* v. *Davisson*, 5 Munf. (Va.), 178; *United States* v. *Vaughan*, 3 Binn. (Pa.), 394.

The rights of parties arising from the shipment of the nails should, we suppose, be governed by the local law of the state of Maryland, where the shipment was made. Story's Conflict of Laws, §§ 397, 398, 399; *Black et al.* v. *Zacharie & Co.*, 3 How., 484. These cases establish that an assign- [*437 ment of personal *property, which is valid by the laws of the country where it is made, is binding everywhere. Adopting the course which was pursued in *Black* v. *Zacharie*, the appellee Gilmor took the depositions of Messrs. Glem and Brent, two eminent counsellors, who gave an opinion that the letter of advice from Brien to Wm. Fowle & Sons, and the carrier's receipt, according to the course of decision of the Court of Appeals of Maryland, vest an absolute right to the nails in controversy in Robert Gilmor. In support of their opinions, they refer to the cases of *Powell* v. *Bradlee*, 9 Gill & J. (Md.), 220, and 2 Harr. & M. (Md.), 453.

The claim of Wm. Fowle & Sons cannot be sustained, because no account has been filed showing the balance claimed by them, and further, that they have only asked relief by their answer. A cross-bill was necessary. *Talbot* v. *McGee*, 4 Mon. (Ky.), 379; *Pattison* v. *Hull*, 9 Cow. (N. Y.), 747.

The nails were not shipped, as Wm. Fowle & Sons suppose, to answer their order of the 21st of February, 1843, but for the benefit of Gilmor, in the manner stated.

The nails were appropriated, (and the evidence thereof accompanied the property,) by Brien to Gilmor, before they came to the possession of Fowle & Sons, and therefore their lien for a general balance does not attach. *Ryberg et al.* v. *Snell*, 2 Wash. C. C., 294; Abbott on Shipping (ed. 1829), 389; *Walker* v. *Birch*, 6 T. R., 262.

Being shipped under a special contract, the nails are not subject to any intervening lien. Story on Agency, § 362; and *Weymouth* v. *Boyer*, before cited.

The bill of lading for the nails, signed by the carrier, being produced by Gilmor, the legal presumption arises that it was delivered to him; either by the carrier or by the consignees, Wm. Fowle & Sons.

John McP. Brien is a competent witness, he has no interest in the result of the suit, he stands in mutual regard between Grove and Gilmor, and his legal interest is equally balanced. A witness who is liable to both parties is competent for either

Stewart v. *Stocker*, 1 Watts (Pa.), 135; *Sommer* v. *Sommer*, Id., 303; *Bailey* v. *Chapell*, 1 Harr. (Del.), 449; *Eldridge* v. *Wadley*, 3 Fairf. (Me.), 371–373; *Blaisdell* v. *Cowell*, 2 Shep. (Me.), 370; *Sherron* v. *Humphreys*, 2 Green (N. J.), 217; *Prince* v. *Shepherd*, 9 Pick. (Mass.), 176; *Emerson* v. *The Prov. Man. Co.*, 12 Mass., 237; *Stump* v. *Roberts*, 1 Cook (Tenn.), 440; *Harwood* v. *Murphy*, 4 Halst. (N. J.), 215; *Nessly* v. *Swearingen*, Add. (Pa.), 144; *Evans* v. *Hettich*, 7 Wheat., 453; *Kirk* v. *Hodgson*, 2 Johns. (N. Y.) Ch., 550; Richardson, 268.

*438] A cross-bill was Gilmor's proper, indeed only, remedy. The *nails were attached and in the hands of a court of equity, and how else could he claim and litigate his right to the property? Story Eq. Pl. from § 319 to § 403 inclusive; 1 Smith Ch. Pr., 449, 460, 461, 462, 463.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of this District, in which a bill was filed by the complainant for the purpose of enforcing the collection of a debt due from John McP. Brien, a non-resident, out of goods belonging to him within the District, in the hands of William Fowle & Sons, the consignees. It was defended by Fowle & Sons, on the ground that they had a lien upon the goods. They also set up, that the property was claimed by R. Gilmor, a merchant in Baltimore. The bill was afterwards amended, making Gilmor a defendant, who answered, setting up his title to the property; and also filed a cross-bill against the complainant, Fowle & Sons, and Brien, setting forth the same title, and praying that the proceeds, the property in the mean time having been sold, might be paid over to him. The defendants put in several answers to the bill; but, upon the view we have taken of the case, it is unnecessary to refer to them particularly.

The facts disclosed which it is material to notice are, that Brien, being indebted to Gilmor, on the 14th of March, 1843, shipped to Fowle & Sons 500 kegs of nails, the property in question, for the purpose of securing such indebtedness, and took from the master of the boat the following receipt or bill of lading:—"Received, March 14, 1843, of John McP. Brien 500 kegs of nails, to be delivered to William Fowle & Sons, Alexandria, D. C., for the use of Robert Gilmor, Esq., Baltimore, in good order." And on the same day sent a letter directed to the consignees, advising them that the goods were consigned for the use of Gilmor; and which was received about the time of the arrival of the goods.

Upon these facts, the court below dismissed the original bill of complainant, with costs, and decreed the proceeds of the property to Gilmor, deducting freight and charges.

The case is here on an appeal by the complainant in the original bill.

We are of opinion, that the decree of the court below was right, and should be affirmed.

The delivery of the goods by Brien to the master, and the bill of lading taken in the name of Gilmor, for the purpose of securing to him an existing indebtedness, operated as a transfer of the legal title; and the shipment, therefore, was not only in *fact, but in judgment of law, for and on his account. Gilmor was the consignor. [*439

The effect of a consignment of goods, generally, is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage. (3 Salk., 290; 1 Ld. Raym., 271; 3 Barn. & Ald., 382; 1 Binn. (Pa.), 109; Abbott on Ship., 216 and note; Long on Sales, 293, Boston ed.)

If the person to whom the goods are ordered to be delivered, is only an agent of the shipper, he has no property in them, and cannot maintain an action against the master for not delivering them, (Abbott, 216; 1 Campb., 369,) nor for damage for negligence of the carrier. (3 Barn. & Ald., 382.) And if the goods are shipped at the risk of the consignor, though the freight is payable by the consignee, the property remains in the former. (Abbott, 216; 1 Johns. (N. Y.), 229.)

These cases, and others that might be referred to, show that the five hundred kegs of nails in the hands of Fowle & Sons were not subject to the attachment of the complainant for the liabilities of Brien, their debtor, as the title to the property had already passed to the defendant, Gilmor; and, also, that Fowle & Sons had no valid lien upon them as consignees for previous advances to Brien by the delivery to the master; as they were only agents to receive the goods on commission for sale, and were advised by the bill of lading and correspondence, that they were shipped for and on account of Gilmor. Though the goods were delivered by Brien to the master for consignment, they were delivered as the property of Gilmor, and under circumstances, as we have seen, that had the effect to invest him with the title. His right, therefore, was prior in point of time to any lien that might have been acquired, either by the complainant or Fowle & Sons, in consequence of Brien's indebtedness, upon the strictest principles of law; and as to the equities, it was but a race of diligence among the

several creditors of a failing debtor to see which should get the first security for their debts.

An objection was made on the argument, that there was no evidence that Gilmor had assented to the transfer of the property to him as security for his demand against Brien, until after the levy of the complainant's attachment.

The original bill was amended, making him a defendant, and in his answer he sets up that the transfer was made in pursuance of a previous agreement between him and Brien, in part liquidation of his indebtedness.

*440] *We are inclined to think this part of the answer is responsive to the bill, and there is no evidence in the case contradicting it in this respect. Though the bill is brief and meagre in the statement of the case which it presents, and has not incorporated in it the amendment making Gilmor a defendant; yet, from the nature of the charge against him, and ground for making him a party, it would seem necessarily to call upon him to set forth his claim to the property in dispute.

But it is unnecessary to place the answer to the objection on this ground. In the absence of all evidence to the contrary, in case of an absolute assignment of property by a debtor to his creditor for the purpose of securing a pre-existing debt, an assent will be presumed on account of the benefit that he is to derive from it.

This principle was recognized and applied by this court in the case of *Tompkins* v. *Wheeler*, 16 Pet., 106, and had been before in *Brooks* v. *Marbury*, 11 Wheat., 96. No expression of assent, the court say, of the person for whose benefit the assignment is made, is necessary to the vesting the title, as the creditor is rarely unwilling to receive his debt from any hand that will pay him.

It was also objected, that Brien was an incompetent witness for Gilmor, on the ground of interest; but it is apparent that he had no interest in the suit, for in any event the property would be applied to the discharge of debts against him, and whether in favor of one or the other was, in point of interest, a matter of indifference to him.

In any view, therefore, that can be properly taken of the case, we are of opinion the decree of the court below was right, and should be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alex-

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andria, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

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*THOMAS C. SHELDON AND ELEANOR SHELDON, HIS WIFE, APPELLANTS, *v.* WILLIAM E. SILL, APPELLEE. [*441

Courts created by statute can have no jurisdiction but such as the statute confers.[1]

Therefore, where the third article of the Constitution of the United States says that the judicial power shall have cognizance over controversies between citizens of different states, but the act of Congress restrains the Circuit Courts from taking cognizance of any suit to recover the contents of a chose in action brought by an assignee, when the original holder could not have maintained the suit, this act of Congress is not inconsistent with the Constitution.

A debt secured by bond and mortgage is a chose in action.

Therefore, where the mortgagor and mortgagee resided in the same state, and the mortgagee assigned the mortgage to the citizen of another state, this assignee could not file his bill for foreclosure in the Circuit Court of the United States.[2]

THIS was an appeal from the Circuit Court of the United States for the District of Michigan, sitting in equity.

The appellee was the complainant in the court below. The bill was filed to procure satisfaction of a bond, executed by the appellant, Thomas C. Sheldon, and secured by a mortgage on lands in Michigan, executed by him and Eleanor his wife, the other appellant. The bond and mortgage were dated on the 1st of November, 1838, and were given by the appellants, then, and ever since, citizens of the state of Michigan, to Eurotas P. Hastings, President of the Bank of Michigan, in trust for the President, Directors, and Company of the Bank of Michigan.

The said Hastings was then and ever since has been a citizen of the state of Michigan, and the Bank of Michigan was a body corporate in the same state.

On the 3d day of January, A. D. 1839, Hastings, President

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[1] CITED. *Daniels* v. *Railroad Co.*, 3 Wall., 254; *The Assessors* v. *Osbornes*, 9 Wall., 575; *Case of the Sewing Machine Cos.*, 18 Wall., 577.

[2] DISTINGUISHED. *Ober* v. *Gallagher*, 3 Otto, 205 FOLLOWED. *Merserman* v. *Werges*, 1 McCrary, 534. EXPLAINED. *Deshler* v. *Dodge*, 16 How., 631. CITED. *White* v. *Vermont &c. R. R. Co.*, 21 How., 576; *Walker* v. *Powers*, 14 Otto, 248.

of said bank, under the authority and direction of the Board of Directors, "sold, assigned, and transferred, by deed duly executed under the seal of the bank, and under his own seal, the said bond and mortgage, and the moneys secured thereby, and the estate thereby created," to said Sill, the complainant below, who was then and still is a citizen of New York.

These are all the facts which it is necessary to state, for the purpose of raising the question of jurisdiction.

The Circuit Court decided in favor of the complainant below, and decreed a sale of the mortgaged premises, &c.

From this decree the defendants appealed to this court.

The case was argued by *Mr. Romeyn*, for the appellants, and *Mr. Ashmun* (in a printed argument), for the appellee.

Only so much of the arguments will be given as bear upon the point of jurisdiction.

*442] *Mr. Romeyn*, for the appellants.

The Circuit Court had no jurisdiction.

The complainant below claimed as assignee from a mortgagee, who was a citizen of the same state with the defendants, the mortgagors.

A bond and mortgage, under the laws of the state of Michigan, and in every court of equity, and by the adjudications of this court, on a bill filed to sell mortgaged property, foreclose the equity of redemption, and collect the debt secured by the mortgage, constitute a chose in action, within the intent and meaning of the eleventh section of the Judiciary Act of 1789.

Before stating the points under this, we beg leave to refer to the case of *Dundas et al.* v. *Bowler*, 3 McLean, 205. The opinion in that case was repeated by the court as its opinion in this. It asserts that the eleventh section of the Judiciary Act of 1789 "is in conflict with the Constitution;" that the right of a citizen of one state to sue the citizen of another state in the Federal courts, in all cases, is given directly by the Constitution; that Congress may not restrict it; that the converse is "a new and most dangerous principle, and cannot be maintained."

Points under this Proposition.

I. The eleventh section of the Judiciary Act of 1789, inhibiting a suit by an assignee of a chose in action, in cases where the assignor could not have sued, if no assignment had been made, is constitutional; because, the disposal of the judicial power, except in a few special cases, belongs to Congress; and the courts cannot exercise jurisdiction in every

case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the Federal courts to every subject which the Constitution might warrant. So, again, it has been decided, that Congress have not delegated the exercise of judicial power to the Circuit Courts, but in certain specific cases. Both the Constitution and an act of Congress must concur in conferring power upon the Circuit Courts. A considerable portion of the judicial power, placed at the disposal of Congress by the Constitution, has been intentionally permitted to lie dormant, by not being called into action by law. The eleventh section of the Judiciary Act of 1789, giving jurisdiction to the Circuit Courts, has not covered the whole ground of the Constitution, and those courts cannot, for instance, issue a mandamus, but in those cases in which it may be necessary to the exercise of their jurisdiction; for,—

*1st. This is the settled, practical construction, which, irrespective of express adjudications on this topic, concludes the question. [*443

2d. The point itself has been repeatedly and fully discussed and directly settled, on solemn deliberation, and not "without inquiry as to the validity of the act."

We propose to cite some authorities on these propositions, in the above order; and then to notice the authorities cited in the opinion below.

First. Cases as to practical construction and its effect.

(The counsel then cited a number of cases under this head.)

Second. Cases to show that this principle has been deliberately settled.

The general principle for which we contend is the necessity of legislation to define and vest jurisdiction in the Circuit Court. The opposing principle is, the right and duty of the courts to exercise jurisdiction to the extent of the constitutional limit, by virtue of its provisions and without the authority of Congress. We refer to *United States Bank* v. *Deveaux*, 5 Cranch, 61; *Osborne* v. *Bank of United States*, 9 Wheat., 738; 1 Wash., 235; 7 Cranch, 32; Id., 504; 3 Wheat., 336; 12 Pet., 616; also 623, 642; 14 Id., 75; 2 How., 243.

In *Turner* v. *Bank of America*, 4 Dall., 8, the very question arose, and was decided. *Cary* v. *Curtis*, 3 How., 245; 1 Kent Com., 513.

(The counsel then reviewed the authorities cited to support the opinion in *Dundas* v. *Bowler*, and contended that they did not sustain it.)

II. The statute in question should be construed according

to the ordinary and usual acceptation of the terms used in it. Because,—

1st. It is constitutional.

2d. If unconstitutional, it should be entirely rejected.

If sustained at all, it should be subjected to the ordinary rules of interpretation.

III. The phrase, "other choses in action," includes the bond and mortgage in this suit. Because,—

1st. The statute was not intended to be confined to negotiable instruments, as is intimated in *Dundas* v. *Bowler*, 8 McLean, 209. For,—

First. If an instrument not negotiable be assigned, the assignee can sue in equity in his own name, and therefore the reason given in *Dundas* v. *Bowler* is not sound.

Second. The exception, in the Judiciary Act, of foreign bills of exchange, will leave nothing of consequence for this language to cover, if it be confined to negotiable instruments.

*444] *Third. This comprehensive meaning of the clause is a matter of express decision,—decisions which have remained for forty years unquestioned. In *Sere* v. *Pitot*, 6 Cranch, 332, Chief Justice Marshall decides that promissory notes were not alone in the contemplation of Congress, and that the "intention was to except from the jurisdiction those who could sue by virtue of equitable assignments, as well as those who could do so by virtue of legal assignments." "The term 'other chose in action,' is broad enough to include either case."

2d. The object of the statute was to preserve to the state judicatures the interpretations and enforcement of contracts made between their own citizens; and the general nature of a bond and mortgage, and the fact that they affect the realty of the state, render it particularly proper that they should not be considered out of the statute.

3d. There is greater reason for inhibiting the collection of mortgage debts in the United States courts, by an assignee, than of negotiable instruments, because, in case of the latter, a transfer for the purpose of jurisdiction would defeat the action; while in the case of the former, if the assignment of a mortgage be viewed as the transfer of a title, the consideration cannot be made the subject of inquiry. *Briggs* v. *French*, 2 Sumn., 252; *Smith* v. *Kernochen*, 7 How., 216.

4th. The statute includes every such right as is ordinarily termed a chose in action; by which is meant, not a right which may be sued for, but one which can be realized only by suit; not a claim to property in specie, which may, if opportunity offer, be exercised by caption or entry, but a right to a

debt, or damages, or money which can be recovered only by action. 1 Chit., 99.

A deed of land is not a chose in action. A writer on the *jus mariti*, after informing his readers that the husband might dispose of his wife's choses in action, will hardly need to add that this did not include her "deeds for real estate."

5th. The transferee of a bond and mortgage is usually termed an assignee, and therefore is within the act.

We ask an application of the old and familiar rule, that, when words of a fixed legal import are used in a statute, such meaning will be accorded to them in its construction. Chief Justice Marshall applied it to the interpretation of this statute in 6 Cranch, 332, when, referring to the reason why the court, in 4 Cranch, held that an alien administrator might sue when the intestate could not, he said, "The representatives of a deceased person are not usually designated by the term assignee." So Justice Story at the Circuit and this Court, on several occasions, *in determining that the [*445 bearer of a promissory note could sue when the payee could not, said that the plaintiff's title did not rest upon what was generally and commonly known as an assignment, and that the words of the statute were employed in the ordinary popular professional sense.

6th. Even at law, the mortgage is considered but as a chose in action, and the mortgagor is the real owner.

(The counsel then cited a number of cases to show how a mortgage, even at law, is regarded by the English courts, by American courts generally, and by the Federal courts.)

Doug., 610; 1 Powell on Mort., 109, 110; 4 Kent Com., 159, 160; 2 Vern., 401; 2 Jac. & W., 194 *n.*; 4 Conn., 285, 424; 6 Id., 158 to 164; 18 Johns. (N. Y.), 114; 4 Kent Com., 161, note *a*; 21 Wend. (N. Y.), 483; 2 Gall., 154; 5 Pet., 483; 1 Paine, 584; 9 Wheat., 489.

7th. Whatever be the doctrine at law, in equity a mortgage is styled and treated, in all its relations and for all purposes, as a chose in action. 2 Jac. & W., 185; 1 Hopkins, 594; Story Eq., §§ 1013, 1015, 1016.

8th. If it be conceded that the complainant might have brought ejectment on the mortgage, it would not affect the character of the action. For,—

First. This action can be fully sustained by an informal transfer, or even a simple delivery of the mortgage, without writing; while an ejectment would require a formal, regular transfer, with the solemnity of other deeds of realty, in order to pass the legal estate.

Second That both proceedings grow out of the same

transactions proves nothing; because there may be two remedies for one debt, in one of which the Federal court has jurisdiction, and not in the other.

The indorsee of a note may sue on a direct promise to him by the maker, when he could not sue as indorsee. 5 How. 274.

The assignment of the mortgage, without an assignment of the debt, is a nullity. 2 Cow. (N. Y.) 23. While an assignment of the debt carries with it the interest in the land. 2 Gall. 155. In this case, an assignee of the bond alone could not sue on it in this court. This proves that an assignment of the debt will not confer jurisdiction.

If we grant that he could sue in ejectment at law as assignee of the mortgage, the question would still remain, how should he be viewed when suing in equity for his money, and not for the land, and on both the bond and mortgage?

*446] Finally, we ask particular attention to the effect upon the *rights of the mortgagee produced by the statute of Michigan, forbidding him to bring ejectment before foreclosure and sale. How emphatically does it reduce his claim to a chose in action. He has no longer a title, upon which he can even take possession; but, according to the only substantial right ever intended to be secured, a claim for money, and the right to an appropriation of the land by suit to make it. And it is no answer to this, that this law, taking away a remedy, does not bind the Federal court. It is equally high evidence of the doctrines of our state, in relation to the nature of the right of a mortgagee.

The argument of the counsel for the appellee upon the question of jurisdiction was as follows.

With regard to the first point, the objection is based upon the act of Congress, which provides that the Circuit Court shall not have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless such suit might have been prosecuted in such court to recover said contents if no assignment had been made, except in cases of a foreign bill of exchange.

The Constitution of the United States (§ 2 of article 3) says the judicial power shall extend to controversies between citizens of different states, and, in section one of the same article, it says that this judicial power shall be vested in one Supreme Court, and such inferior courts as Congress shall from time to time establish.

Now we would remark, first, that the case before the Circuit Court was a controversy between citizens of different states,

and to such a controversy the judicial power of the courts of the United States extends by the Constitution, and by the same Constitution that power is vested, except where the Supreme Court has original jurisdiction by the Constitution, in the inferior courts created by Congress. This judicial power, therefore, to take cognizance of this case, is, by the Constitution, vested in the Circuit Court, and the plaintiff claims the constitutional right to have his controversy with Mr. Sheldon, living in Michigan, decided by that court. Congress has said, by the provision above referred to, that there are certain controversies between citizens of different states which the United States courts shall not take cognizance of; yet the judicial power of the court extends to them by the Constitution, and citizens of the different states have the right to have that power exercised in their controversies. Where does Congress get the power or authority to deprive the courts of the United States of the judicial power with which the Constitution has invested them? *Congress may [*447 create the courts, but they are clothed with their powers by the Constitution, and we submit that the provision of the act of Congress materially conflicts with the provisions of the Constitution, and is void. It has been settled, that an act of Congress, enlarging the jurisdiction of the Supreme Court beyond the terms of the Constitution, is void. *Marbury* v. *Madison*, 1 Cranch, 137. Can it any more take away a constitutional power than it can confer an unconstitutional one? We submit that it cannot. The jurisdiction of this class of controversies is in the Circuit Court. The Constitution makes no such distinction as the act of Congress does, and we respectfully submit, that it is of the utmost importance to citizens of the different states that the whole judicial power granted by the Constitution to the courts of the United States should be exercised. We are aware that in some cases it has been assumed that this act of Congress is valid; but we submit that there has been no decision of this court to that effect, and even if there had, being erroneous, the court would reverse it.

But a mortgage is not a promissory note or chose in action, within the meaning of the provisions of the act of Congress. A mortgage is a conveyance of the fee simple of real estate, liable to be defeated subsequently by payment of money, to secure the payment of which it was made. It is in no sense a chose in action, which is a thing in action, a right of action, a thing recoverable in action, a debt, a demand, a promissory note, a right to recover damages. A chose in action was originally a right of action not assignable at law. It was a

cause of suit for a debt due or a wrong. The bond with the mortgage may be a chose in action; but the estate conveyed by the mortgage is not. It is a realty. It is real estate conveyed, and at law the estate is absolute, forfeited, perfect. In equity it may be redeemed; but the estate is nevertheless absolute, and redemption is a matter of favor or equity rather than a legal right. How does this partake of a chose in action? Now what is a foreclosure bill? It is not a suit upon a bond, but a proceeding in law against property, to cut off the equitable right to redeem within a certain period, and to procure a sale of the real estate. It is not a personal action, —seeks no decree against the person,—but simply asks that certain property conveyed to the plaintiff may be sold, and further right to redeem foreclosed. An ejectment lies upon a mortgage, especially after forfeiture; the mortgagee may convey the estate, and ejectment lies in favor of his grantee. Will it be said that his grantee, though living in another state, could not maintain an ejectment in this court to recover *448] the property? Cannot his grantee equally appeal *to this court to foreclose the equity to redeem? This point has been directly passed upon in the Circuit Court for the District of Ohio, in the case of *Dundas et al.* v. *Bowler and others*, reported in the first volume of Western Law Journal, and the decision of the court is sustained by the soundest reasoning. 3 McLean, 205.

Mr. Justice GRIER delivered the opinion of the court.

The only question which it will be necessary to notice in this case is, whether the Circuit Court had jurisdiction.

Sill, the complainant below, a citizen of New York, filed his bill in the Circuit Court of the United States for Michigan, against Sheldon, claiming to recover the amount of a bond and mortgage, which had been assigned to him by Hastings, the President of the Bank of Michigan.

Sheldon, in his answer, among other things, pleaded that "the bond and mortgage in controversy, having been originally given by a citizen of Michigan to another citizen of the same state, and the complainant being assignee of them, the Circuit Court had no jurisdiction."

The eleventh section of the Judiciary Act, which defines the jurisdiction of the Circuit Courts, restrains them from taking "cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange."

The third article of the Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish." The second section of the same article enumerates the cases and controversies of which the judicial power shall have cognizance, and, among others, it specifies "controversies between citizens of different states."

It has been alleged, that this restriction of the Judiciary Act, with regard to assignees of choses in action, is in conflict with this provision of the Constitution, and therefore void.

It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result,—either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. *The first of these inferences has [*449 never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.[1]

The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary.

In the case of *Turner* v. *Bank of North America*, 4 Dall., 10, it was contended, as in this case, that, as it was a controversy between citizens of different states, the Constitution gave the plaintiff a right to sue in the Circuit Court, notwithstanding

[1] CITED. *Daniels* v. *Railroad Co.*, 3 Wall., 254; *The Assessors* v. *Osbornes*, 9 Id., 575; *Case of the Sewing Machine Cos.*, 18 Id., 577.

he was an assignee within the restriction of the eleventh section of the Judiciary Act. But the court said.—"The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress; and Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject, in every form which the Constitution might warrant." This decision was made in 1799; since that time, the same doctrine has been frequently asserted by this court, as may be seen in *McIntire* v. *Wood*, 7 Cranch, 506; *Kendall* v. *United States*, 12 Pet., 616; *Cary* v. *Curtis*, 3 How., 245.

The only remaining inquiry is, whether the complainant in this case is the assignee of a "chose in action," within the meaning of the statute. The term "chose in action" is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another, by action.[2]

It is true, a deed or title for land does not come within this description. And it is true, also, that a mortgagee may avail himself of his legal title to recover in ejectment, in a court of law. Yet, even there, he is considered as having but a chattel interest, while the mortgagor is treated as the true owner. The land will descend to the heir of the mortgagor. His widow will be entitled to dower. But on the death of the mortgagee, the debt secured by the mortgage will be assets in the hands of his executor, and although the technical legal estate may descend to his heir, it can be used only for the purpose of obtaining satisfaction of the debt. The heir will be but a trustee for the executor.

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In equity, the debt or bond is treated as the principal, and the mortgage as the incident. It passes by the assignment or transfer of the bond, and is discharged by its payment. It is, in fact, but a special security, or lien on the property mortgaged. The remedy obtained on it in a court of equity is not the recovery of land, but the satisfaction of the debt. It is the pursuit by action of one debt on two instruments or securities, the one general, the other special. The decree is, that the mortgaged premises be sold to pay the debt, and if insufficient for that purpose, that the complainant have further remedy, by execution, for the balance.

The complainant in this case is the purchaser and assignee of a sum of money, a debt, a chose in action, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is therefore the "assignee of a chose in action,"

[2] Explained *Deshler* v *Dodge*, 16 How., 631.

within the letter and spirit of the act of Congress under consideration, and cannot support this action in the Circuit Court of the United States, where his assignor could not.

The judgment of the Circuit Court must therefore be reversed, for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that this cause be, and the same is hereby, reversed, for the want of jurisdiction in that court, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to dismiss the bill of complaint for the want of jurisdiction.

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*JACOB LE ROY, PLAINTIFF IN ERROR, v. WILLIAM BEARD. [*451

By the laws of Wisconsin, where the contract in question was made, a scroll or any device by way of seal has the same effect as an actual seal. But in New York it is otherwise, and an action brought in New York upon such an instrument must be an action appropriate to unsealed instruments.

Therefore, where a deed was executed with a scroll in Wisconsin, which contained a covenant of seizin, and an action was brought in New York for a breach of this, it was properly an action of assumpsit, and not covenant.[1]

It was not necessary in the declaration to allege an eviction, because the covenant was broken as soon as made.

Where a power of attorney authorized the agent "to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased," and "on such terms in all respects as he shall deem most advantageous," and "to execute deeds of conveyance necessary for the full and perfect transfer of all our respective right, title, &c., as sufficiently in all respects as we ourselves could do personally in the premises," these expressions, aided by the situation of the parties and the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing upon the question, must be construed as giving to the agent the power to enter into a covenant of seizin.[2]

Some of the general rules stated for the construction of powers.

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[1] CITED. *Pritchard* v. *Norton*, 16 Otto, 133.

[2] CITED. *Very* v. *Levy*, 13 How., 359. Such a power authorizes the attorney to enter into a covenant of general warranty. *Taggert* v. *Stanberry*, 2 McLean, 543.

A power which authorizes the agent to "sell or lease" &c., empowers him to complete a sale by making a deed of conveyance. *Hemstreet* v. *Burdick*, 9 Ill., 444.

A power "to superintend any real and personal estate, to make contracts, to settle outstanding debts, and, generally, to do all things that concern my interest in any way, real or personal, whatsoever, giving my said attorney full power to use my name to release others or to bind myself, as he may

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of New York.

The facts of the case were these:

On the 31st of August, 1836, Jacob Le Roy and Charlotte D. Le Roy, citizens of the state of New York, executed the following power of attorney:—

"Know all men by these presents, that we, Jacob Le Roy and Charlotte D. Le Roy, his wife, of the town of Le Roy, in the county of Genessee, and state of New York, have constituted and appointed, and by these presents do constitute and appoint, Elisha Starr, of the same place, our true and lawful attorney, for the purposes following, to wit: In the name of the said Jacob Le Roy, and for his use and benefit, to expend and invest certain moneys for that purpose herewith placed by him in the hands of the said Starr, in the purchase of lands and real estate in some of the Western states and territories of the United States, at the discretion of the said Starr, and to take the certificates, titles, deeds, or other evidences of such purchases, to and in the name of the said Jacob Le Roy; and also, for and in the names of the said Jacob Le Roy and Charlotte D. Le Roy, to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased by the said Starr with the money herewith furnished him, or any other lands or real estate heretofore purchased in
*452] the said states or territories, by the said Starr or Suffrencis Dewy, for the *said Jacob Le Roy, and now owned by him, or any lands which may have been bought with the avails of the lands so purchased as aforesaid, or for which the same may have been exchanged, to such person or persons, for such consideration, and on such terms, in all respects, as the said Starr shall deem most advantageous; and for us, and in our names, to execute to the purchaser or purchasers thereof, the assignments, contracts, or deeds of conveyance necessary for the full and perfect transfer of all of our respective right, title, and interest, dower and right of dower, as sufficiently, in all respects, as we ourselves could do personally in the premises; and generally, as the agent and attorney of the said Jacob Le Roy, to purchase lands or real estate with the money now furnished him, and to sell, re-sell, and exchange the same, or any lands heretofore purchased by him for the

deem proper," &c., does not empower the attorney to sell and convey real estate. *Hunter* v. *Sacramento Beet Sugar Co.*, 7 Sawy., 498.

A power to dispose of the "proceeds" of a sale of land, authorizes the agent to sell the land. *Boyd* v. *Satterwhite*, 10 So. Car., 45.

said Jacob Le Roy, or any lands or real estate that he may acquire in consideration of the sale or exchange of the same, to such persons, and on such terms, in all respects, as he may deem most eligible; and to do all acts legally necessary for the perfect transfer to such persons of the title of the same; we hereby ratifying and confirming whatsoever our said attorney shall do in the premises, by virtue of these presents, until the 1st day of July next, 1837; from and after which day, these presents, and the powers conferred thereby, shall cease, and be null and void.

"Sealed with our seals, and dated this 31st day of August, 1836.

"JACOB LE ROY, [L. S.]
CHARLOTTE D. LE ROY. [L. S.]

"In presence of—"

This power was regularly acknowledged.

On the 7th of November, 1836, Starr executed the deed which was the subject of the present controversy, viz.:—

"This indenture, made this 7th day of November, in the year of our Lord 1836, between Jacob Le Roy and Charlotte D. Le Roy, wife of said Jacob, both of Le Roy, Genesee county, state of New York, by Elisha Starr, now of Milwaukee, in the territory of Wisconsin, their lawful attorney, parties of the first part; and William Beard, of Newtown, Fairfield county, and state of Connecticut, party of the second part, witnesseth: that the said party of the first part, for and in consideration of one thousand eight hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, alien, and confirm, unto the said party of the *second [*453 part, and to his heirs and assigns, for ever, one certain piece or parcel of land, situated in the town of Milwaukee, and territory of Wisconsin, viz.: One equal undivided acre of land, in fifty-seven and sixty hundredths acres, said fifty-seven and sixty hundredth acres being in township lot number three of the southeast fractional quarter of section number thirty-two in said township seven, north of range twenty-two east, it being part of the same tract of land conveyed to us by Levi C. Turner, of Cooperstown, Otsego county, state of New York, as per his deed, bearing date the 28th day of April, 1836; together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertain-

ing, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. And all the estate, right, title, interest, claim, or demand whatsoever, of the said party of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, and to his heirs and assigns, to their sole and only proper use, benefit, and behoof, for ever. And the said parties of the first part, by their attorney as aforesaid, for their heirs, executors, and administrators, do covenant, grant, bargain, and agree, to and with the said party of the second part, and his heirs and assigns, that, at the time of the ensealing and delivering these presents, we are well seized of the premises above conveyed, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and have good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form as aforesaid. And that the same are free and clear of all encumbrances, of what kind and nature soever. And that the above-bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, they will for ever warrant and defend.

"In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written. "JACOB LE ROY, [L. S.]
By Elisha Starr, his Attorney.
"CHARLOTTE D. LE ROY, [L. S.]
By Elisha Starr, her Attorney.

"Sealed and delivered in presence of
HANS CROCKER,
DAVID V. B. BALDWIN."

*454] *This deed was regularly acknowledged and recorded in Wisconsin.

There were three persons, viz., Nichols, Baldwin, and Beard, engaged in making purchases from Starr, each upon his own account, and the following letters were read upon the trial. They are inserted because the opinion of the court lays some stress upon the actions of the parties.

"*Newtown, August* 28, 1838.

"JACOB LE ROY, ESQ.:—

"Dear Sir,—I take the liberty of forwarding to you the

following information, by advices lately received from my attorney at Milwaukie. I learn that the title of the property I purchased of you in Milwaukie, in November, 1836, has failed, in consequence of the Indian title not being extinguished when the property was floated. I further learn that the receiver or land-officer has been directed to refund the purchase-money to the original purchaser, and that the subject has been before the Solicitor of the Treasury, and he has directed that the property belongs to the government, and that an appeal was taken from his decision to the Secretary of the Treasury, who confirmed the decision.

"If so, you are doubtless aware that, upon your covenants of warranty, you are liable to refund to me the purchase-money, which I shall expect you to do, together with the interest on the same. If a deed of release or quitclaim will be of any service to you, you can have one when the money is refunded.

"I shall be happy to hear from you on the receipt of this, and any proposition you may have to make regarding the premises will be duly considered.

"Your obedient servant,

(Signed,) THEOPHILUS NICHOLS."

"*Le Roy*, 2*d September*, 1838.

"Dear Sir,—I received last evening yours of the 28th, and the contents surprised me not a little, that I, who held large possessions in Milwaukie, and in constant communication with that place, should receive the first intelligence of so great a misfortune from you. I received a letter three days ago from that place, but not a word is said about any trouble, and I have therefore come to the conclusion your agent has been hoaxed; the whole statement carries on the face of it an absurdity. Admitting that any thing had occurred as you state, have not the United States received the same amount *there from their land as they have elsewhere? [*455 Do you imagine that Congress would allow innocent persons to suffer in a case of that kind? I have written to Milwaukie by this day's mail to ascertain if there is any difficulty, and in the interim would beg you to keep easy in mind, for you may rest assured that your title will never be disturbed.

"Respectfully, yours, truly,

(Signed,) JACOB LE ROY."

"*New York*, 12*th June*, 1839.

"THEOPHILUS NICHOLS, ESQ.:—

"Sir,—Your letter of the 1st instant was returned to me

this day from Le Roy. In reply I state, that the title to the lands purchased from me is derived from the United States, and I know of no mode by which a sale can be rescinded by any officer of the government after it has been once consummated. If any error has been committed, of which I have no information upon which reliance ought to be placed in transactions of business, the government will no doubt correct it. Besides, as my grantor is liable to me if there is any defect of title, I can make no voluntary settlement without increasing the difficulties. There were many purchasers at the public sales of the lands of which those I sold are a part, who have sold out, and it cannot be possible, if there is any substantial legal defect in the sale, that the question will not soon receive the adjudication of some sufficient legal tribunal, when I shall always be willing to fulfil any legal claims which I may be under to you or your friends.

"With respect, yours, &c.,

"JACOB LE ROY."

"*New York, 5th February*, 1841.

"Dear Sir:—Yours, addressed to me at Le Roy, came to hand in due course, being returned to this place. In reply to your remarks I have only to say, that so soon as the highest tribunals of our country shall decide that my title to the land sold you is defective, I shall be ready to settle with you on just principles; but until then I must decline all negotiations. You say that the title is bad. Perhaps you are not aware that an act passed the Senate of the United States at its last session, unanimously confirming the sale, and was only lost in the House for want of time. I am in great hopes that relief will be obtained this session; but at any rate a long time cannot now elapse before justice will be done us; for a more *456] righteous claim there cannot be. My situation is the same as yours. *Until such decision is made, I cannot make claim from those from whom I purchased.

"With great respect, yours, truly,

"JACOB LE ROY.

"WILLIAM BEARD, ESQ., *Newtown*."

On the 24th of June, 1841, Beard, a citizen of the state of Connecticut, brought his action in the Circuit Court of New York against Le Roy. It was an action of assumpsit, containing the ordinary money counts, and also two special counts stating the purchase and sale, the covenant of seizin, and an averment that the grantor was not so seized, whereby he became unable to repay the $1800.

The defendant pleaded the general issue to the money counts, and a special plea that he had a good title to the premises described in the declaration. To this plea there was a general replication.

In April, 1846, the case came up for trial.

The counsel for the plaintiff offered in evidence the power of attorney, the deposition of Starr, the oral evidence of Nichols, the letters above recited, and some other evidence not material to be mentioned.

The counsel for the plaintiff then offered to read in evidence the deed or instrument of conveyance executed by the defendant, by Elisha Starr, his attorney, to the plaintiff, with a scroll and the word "Seal" written therein, opposite the name of the defendant, as subscribed in execution thereof, without any wafer, wax, or other tenacious substance being affixed thereto; referred to in, and proved by, the said depositions. The counsel for the defendant objected to the reading of the covenants contained in said deed so offered, on the ground that the power of attorney from the defendant to Starr did not authorize Starr to enter into such covenants on behalf of the defendant.

The court overruled the objection, and the defendant's counsel excepted.

The counsel for the plaintiff then offered numerous papers from the General Land Office, to show that the title of Le Roy was not good in the premises conveyed.

The counsel for the defendant then offered to read in evidence, on his part, from a book purporting to be a printed copy of the laws enacted by the Legislature of the Territory of Wisconsin, "an act of the said Legislature in relation to seals."

The counsel for the plaintiff objected to the evidence so offered, on the ground that the same was not authenticated in *such manner as to entitle the same to be read [*457
in evidence; and the court overruled the objection; and to the decision thereupon, the counsel for the plaintiff excepted.

The counsel for the defendant then read in evidence from said printed book as follows:—

"SEC. 5. That any instrument, to which the person making the same shall affix any device by way of seal, shall be adjudged and held to be of the same force and obligation as if it were actually sealed."

The counsel for the defendant then prayed the court to instruct the jury, among other things, that no action can be sustained against the defendant in this suit, because the power of attorney executed by the defendant to Elisha Starr, did not authorize Elisha Starr to warrant the title of the defendant

to any lands which might be sold by him under said power of attorney.

The counsel for the plaintiff then prayed the court to give its instruction to the jury upon the construction of the power of attorney executed by the defendant to Elisha Starr, so given in evidence at this stage of the cause, as, in the event of such construction being against the existence of such authority in said attorney under said power, the said plaintiff had further evidence to give of the representations of the said agent to the said plaintiff at the time of, and made as a part of, the transaction.

The court reserved for the present their opinion upon the question, for the purpose of hearing the further evidence of the plaintiff, so as to enable him to bring out the whole case, and perhaps thereby save another trial.

The counsel for the plaintiff then offered to prove that, at the time of negotiating the sale of, and of selling, the land described in said deed to the plaintiff, the said Elisha Starr fraudulently represented to the plaintiff that he, the said Elisha Starr, was authorized by the defendant to warrant the defendant's title to the premises therein described, and withheld from the plaintiff any view of the power of attorney in question; and that the plaintiff refused to make the purchase, or take any conveyance of such lands, without such warranty on the part of the defendant.

The counsel for the defendant objected to the evidence so offered as incompetent and inadmissible, and the court sustained the objection, and excluded the testimony; and the counsel for the plaintiff excepted to the decision.

The counsel for the plaintiff next offered to prove, that, at
*458] the time of the negotiation of the said sale between Starr and *the plaintiff, and as a part of the transaction, the said Elisha Starr, as the agent of the defendant, also fraudulently represented to the plaintiff that the defendant had a good and valid title to the land described in the said deed, and that the plaintiff was deceived thereby.

The counsel for the defendant objected to the evidence so offered, and the court overruled the objection, and to the decision thereon the counsel for the defendant excepted.

The counsel for the plaintiff recalled Theophilus Nichols, who further testified, that he was present at the negotiations and bargain between the plaintiff and Elisha Starr, as the agent of the defendant, as to the sale of the acre of land described in said deed; that Mr. Starr stated that the title to the land was good, and there could not be a question about it, because the defendant had the government title; that it had

been sold by the government about a year previous to that time. That Linus Thompson and others had floated off George Walker, who had first settled on it, and claimed a preëmption right, but who had got no patent; that the defendant's title was direct from the government, and there was no question about it. Mr. Starr proposed to give to the plaintiff a quit-claim deed, and said it was just as well, as the title came from the government. The plaintiff said he would not accept it; that he would not take the land unless he had covenants of warranty; and Mr. Starr then gave the plaintiff the deed read in evidence in this case. No title papers were produced by Starr, or exhibited to the plaintiff. It was stated in the body of the deed executed by Starr, from whom the defendant had purchased, but he did not exhibit to the plaintiff any papers of any kind. Plaintiff, and Mr. Baldwin, and witness, all staid together at the public house kept by Starr. They all went to Milwaukie together for the same purpose; staid together, purchased together, and left together. The plaintiff did not make any examination of the title that witness knows of. Witness purchased an acre of the defendant of the same title, at the same time, and under the same representations; and witness did not make any examination of title, but relied upon the representations of Mr. Starr. They all left Milwaukie on the 10th of November, 1836, three days after they made the purchase.

The counsel for the plaintiff then recalled David V. B. Baldwin, who further testified, that he had heard the testimony just given by Mr. Nichols, and concurred with him as to the representations made by Mr. Starr, and the acts done by the parties in making such purchase; that he was present and acting with the others in the transaction; that no examination of the title *was made by him, nor by either of the [*459 others, to his knowledge.

The counsel for the plaintiff next read in evidence, from the same volume of the statutes of Wisconsin above referred to, an act of the Legislature of the Territory of Wisconsin, entitled "An act in relation to fraudulent conveyances of lands and the conveyance thereof," the sixth section of said title, in the words and figures following, to wit:—

"SEC. 6. No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting,

assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing."

The proofs in the cause were here closed.

The counsel for the defendant prayed the court to instruct the jury,—

First. That the plaintiff had not proved the failure of the defendant's title to the lands in question, because he had not shown that the defendant had not acquired a title from the French settlers, or other source than the government of the United States.

Second. That if it be shown that the defendant claimed title under the government of the United States, the plaintiff has not shown that the title of the defendant to said lands has been legally declared to be invalid. That the certificate of the register of the land office at Green Bay gave a title to the lands, and the only power vested in the officers of the government at Washington was to see that two patents were not issued for the same land.

Third. That by the acts of Congress granting rights of preemption to actual settlers, Linus Thompson had a right to float upon the land in question; and that the decision of the Secretary of the Treasury annulling the certificate of the register was contrary to law, and void. That under the Chicago treaty the lands in question were public lands at the date of the passage of the said act.

Fourth. That the deed of defendant in evidence in this cause is a sealed instrument by the law of the Territory of Wisconsin, and is to be treated and regarded as a sealed instrument in the state of New York, because of its character at the place where it was made; and that the present action being assumpsit, such cannot be maintained upon said deed.

*460] *Fifth. That no action will lie upon this deed upon a failure of the title to the lands therein described, without express covenants of warranty; there being no valid warranty against the defendant, the plaintiff is not entitled to recover.

Sixth. That the plaintiff is not entitled to recover in this form of action, if a fraud be proved in the cause, but should have brought an action on the case for deceit.

The counsel for the plaintiff then prayed the said court to instruct the jury, that the action of assumpsit is properly brought in this court upon the promises of the defendant contained in said deed, if any promises are made therein which are binding or obligatory upon the defendant.

The court so instructed the jury, and to such instruction the counsel for the defendant excepted.

The counsel for the plaintiff then prayed the court to instruct the jury, that the deed in question being without seal, by the laws of the state of New York, and a deed to convey lands in the territory of Wisconsin not being required by the laws of that territory to have any seal, or any device by way of seal, affixed thereto, it is competent for the plaintiff to prove a ratification of the defendant, by parol, of the act of Starr as his attorney, in warranting such title.

The court refused so to instruct the jury, and thereupon instructed the jury that, by the laws of the territory of Wisconsin, the said deed is an instrument under seal, that it is a covenant by the laws of that territory, and this court must so regard it, and give it the same effect here that it would have in the territory of Wisconsin; that being a covenant by the laws of that territory, there can be no ratification or confirmation of the act of the agent, Starr, by the defendant, which will be binding upon the defendant, unless made by an instrument executed by him under seal.

The counsel for the plaintiff then prayed the said court to submit to the jury, upon the facts in evidence, the question, whether the defendant, with full knowledge that his agent, Elisha Starr, had assumed in his name to warrant, and had warranted, the title to the land in question to the plaintiff, had ratified the act of the said agent in making such warranty.

The court refused to submit the said question of ratification to the jury upon the evidence in the case, and to such refusal of the said court the counsel for the plaintiff then and there excepted.

The counsel for the plaintiff then prayed the court to instruct the jury, that the agent of the defendant having undertaken to convey a title to the plaintiff, and the defendant having *given the agent authority so to do, [*461 if the jury believe the defendant had no title to the premises described in said deed, at the time of the execution and delivery thereof, then the consideration for which the plaintiff paid his money to the defendant has failed, and the plaintiff is entitled to recover.

The court refused so to instruct the jury, and to such refusal the counsel for the plaintiff excepted.

The counsel for the plaintiff then prayed the court to instruct the jury, that if the defendant's agent made a representation to the plaintiff, as to the title of the defendant to the land described in said deed, which was untrue, and which was material to, and was relied upon by, the plaintiff, so that the plaintiff was actually deceived as to the subject he was acquiring by his bargain, the plaintiff is entitled to recover.

whether there was moral fraud or not on the part of the agent in making such representations.

The court refused so to instruct the jury, and to the said refusal the counsel for the plaintiff excepted.

The counsel for the plaintiff then requested the said court to submit to the jury, upon the evidence in the case, the question, whether Elisha Starr, by fraudulent representations, induced the plaintiff to believe that the defendant had title to the land described in said deed when the defendant had no such title, and upon such belief became the purchaser thereof.

The court refused to submit such question to the jury, on the ground that the evidence so introduced on the part of the said plaintiff did not go far enough to raise the question of fraud on the part of the agent of the defendant, and decided that the plaintiff must give evidence of knowledge on the part of the agent, at the time of making such representations, that the representations so made were untrue.

To which refusal and decision the counsel for the plaintiff then and there excepted.

The counsel for the plaintiff then prayed the court to submit the question to the jury, upon the evidence in the case, whether the agent of the defendant, at the time of making the representations so made by him to the plaintiff, had not knowledge that the representations so made by him were untrue.

The court refused to submit the said question to the jury, on the ground that no evidence had been given, on the part of the plaintiff, to authorize the submission thereof.

To which refusal of the said court the counsel for the plaintiff then and there excepted.

The court instructed the jury in respect to the question *462] reserved in the course of the trial, that the power of attorney, *upon a true construction of its terms and conditions, conferred upon the agent authority to give a deed of the land with covenant of warranty, to which the counsel for the defendant then and there excepted.

The jury thereupon, under the charge of the court, rendered a verdict for the plaintiff of $2,862.25 damages, and six cents costs.

Upon these several exceptions, the case came up to this court.

It was argued by *Mr. Blunt* and *Mr. Webster*, for the plaintiff in error, and *Mr. Seeley* and *Mr. Baldwin*, for the defendant in error.

The counsel for the plaintiff in error made the following points:—

1st. That the action of assumpsit does not lie in this case. If the deed were binding on the plaintiff in error, the action should have been on the covenants. Chit. Pl., 131, 134, 111, 112, 116; 3 Johns. (N. Y.), 509; 4 Cranch, 239; Story on Conflict of Laws, 475; 2 Cai. (N. Y.), 362; 5 Johns. (N. Y.), 239; 4 Cow. (N. Y.), 508, 530; 7 Cranch, 115; 3 Wheat., 212; 2 Co. Litt., 365 *a*.

2d. The judge erred in instructing the jury, that the power of attorney did authorize Elisha Starr to execute a deed with special covenants. *Frost* v. *Raymond*, 2 Cai. (N. Y.) Cas., 188; *Nixon* v. *Hyserott*, 5 Johns. (N. Y.), 58; 12 Id., 436; 13 Id., 359; *Gibson* v. *Colt*, 7 Id., 390; 2 Johns. (N. Y.) Ch., 519.

3d. The judge admitted evidence to prove failure of title objected to by the defendant below, which was incompetent.

4th. The judge assumed that, upon the evidence, the defendant below had no title.

5th. The counts in the declaration are bad. 5 Johns. (N. Y.), 120; 7 Id., 259, 376; 13 Id., 236.

The points made by the counsel for the defendant in error were the following:—

I. Upon the facts in evidence, it is clear that the title failed.

II. The form of action, being in assumpsit, was right: an action of covenant could not have been sustained in the state of New York.

The first count is special, founded on the instrument of conveyance. The second is also special, but more general, and the third contains the common money counts.

The instrument of conveyance executed by Le Roy's agent, has the form and language of a deed with covenants, but has no seal, a scroll being used in place of a seal.

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*The form of the remedy depends on the *lex fori*.

In *Warren* v. *Lynch*, 5 Johns. (N. Y.), 329 (1810), the Supreme Court held, that "a scrawl with the pen, of L. S., at the end of the name, was not a seal. A seal is an impression on wax or wafer, or some other tenacious substance capable of being impressed." It was admitted in that case, that the note declared on, having been executed in Virginia, with such scrawl, and the initials L. S. at the end of the maker's name, had, by the laws of Virginia, "all the efficacy of an instrument sealed with a wafer or wax." Kent, Ch. J., delivering the opinion of the court, says,—"By the laws of that state, it was a sealed instrument or deed."—"A scrawl with a pen is not a seal;" and it was accordingly held that in the state of

New York, assumpsit was the proper form of action. The same rule has prevailed, without any exception, to the present time. *Van Santwood et al.* v. *Sandford*, 12 Johns. (N. Y.), 198; 4 Cow. (N. Y.), 508; 2 Hill (N. Y.), 228; 3 Id., 493; 1 Den. (N. Y.), 376; 4 Kent Com., 451.

The rule that the form of action, or remedy, depends on the *lex fori*, is everywhere recognized as universal. In *United States Bank* v. *Donally*, 8 Pet., 362, the court says:—"The form of the remedy depends on the *lex fori*, and though an action of covenant will lie on an unsealed instrument in one state, it will not in another state, where covenant can be brought only on a contract under seal." See, also, Story Confl. of L., 470, 475; *De la Vega* v. *Vianna*, 1 Barn. & Ad., 284; *Trimbey* v. *Vignier*, 1 Bing. N. C., 151, per Tindal, Ch. J.; 10 Barn. & C., 908.

III. The power of attorney from Le Roy gave sufficient authority to Starr, as his agent, to covenant for the title of the premises.

(The counsel then entered into an analysis of the power, and examined each paragraph of it.)

4 Co., 81; 10 Wend. (N. Y.), 250; 1 J. J. Marsh. (Ky.), 292; 1 Brod. & B., 319; 2 Sugd. on Vend., 110 (Amer. ed.), 104; 2 Johns. (N. Y.), 595; Co. Litt., § 733, *n.*; 1 Chit. Gen. Pr., 312, 313; 2 Pa., 304; 4 Cruise Dig., 357.

IV. Le Roy cannot disavow in part the contract of his agent, and at the same time retain the money paid by Beard upon the faith of that contract.

V. Assuming that the covenants were not authorized, independently of the preceding views, Beard was deceived by the false representations of Le Roy's agent, and is entitled to recover back the purchase-money in the present action.

VI. The stipulations contained in the instrument of conveyance have been ratified by Le Roy.

*464] *VII. If the attorney mistook his powers to covenant for the title, but undertook to covenant and conveyed no title, Beard is entitled to recover on the count for money had and received, on the ground of a total failure of consideration. He did not get that for which he stipulated and paid his money.

Mr. Justice WOODBURY delivered the opinion of the court.

This was an action of assumpsit for money had and received; and also counting specially, that, on the 17th of November, 1836, the original defendant, Le Roy, in consideration of $1,800 then paid to him by the original plaintiff, Beard, caused to be made to the latter, at Milwaukie, Wisconsin, a convey-

ance, signed by Le Roy and his wife, Charlotte. This conveyance was of a certain lot of land situated in Milwaukie, and contained covenants that they were seized in fee of the lot, and had good right to convey the same. Whereas it was averred, that, in truth, they were not so seized, nor authorized to convey the premises, and that thereby Le Roy became liable to repay the $1800.

Under several instructions given by the Circuit Court for the Southern District of New York, where the suit was instituted, the jury found a verdict for the original plaintiff, on which judgment was rendered in his favor, and which the defendant now seeks to reverse by writ of error. Among those instructions, which were excepted to by the defendant, and are at this time to be considered, was, first, that "the action of assumpsit is properly brought in this court, upon the promises of the defendant contained in the deed, if any promises are made therein which are binding or obligatory on the defendant."

The conveyance in this case was made in the state of Wisconsin, and a scrawl or ink seal was affixed to it, rather than a seal of wax or wafer. By the law of that state, it is provided, that "any instrument, to which the person making the same shall affix any device, by way of seal, shall be adjudged and held to be of the same force and obligation as if it were actually sealed."

But in the state of New York it has been repeatedly held (as in *Warren* v. *Lynch*, 5 Johns. (N. Y.), 329,) that, by its laws, such device, without a wafer or wax, are not to be deemed a seal, and that the proper form of action must be such as is practiced on an unsealed instrument in the state where the suit is instituted; and the latter must therefore be assumpsit. 12 Johns. (N. Y.), 198; 2 Hill, (N. Y.), 544, 228; 3 Id., 493; 1 Den. (N. Y.), 376; 5 Johns. (N. Y.), 329; *Andrews et al.* v. *Herriott*, 4 Cow. (N. Y.), 508, overruling *Meredith* v. *Hinsdale*; 4 Kent, 451; 8 Pet., 362; Story Confl. of *L., 47; 2 Cai. (N. Y.), 362. A like doctrine prevails in some other states. 3 Gill & J. (Md.), 284; [*465
Douglas et al. v. *Oldham*, 6 N. H., 150.

It becomes our duty, then, to consider the instruction given here, in an action brought in the Circuit Court in New York, as correct in relation to the form of the remedy. It was obliged to be in assumpsit in the state of New York, and one of the counts was special on the promise contained in the covenant. We hold this, too, without impairing at all the principle, that, in deciding on the obligation of the instrument as a contract, and not the remedy on it elsewhere, the

law of Wisconsin, as the *lex loci contractus*, must govern.[1] *Robinson* v. *Campbell*, 3 Wheat., 212.

It is further objected here, that an eviction by elder and better title should have been averred in the declaration before a recovery can be had for a breach of warranty.

But such averment is necessary only when the breach is of a covenant for quiet enjoyment, &c. 14 Johns. (N. Y.), 48. Because, in a breach of the covenant of seizin, it is broken at the time of the conveyance if at all, and no eviction need be alleged. 4 Cranch, 421; 4 Kent Com., 474, note.

Here it virtually appears that the original defendant was not seized. Little attempt is made to show that he was; and the title, so far as disclosed in the evidence, could not have been in him or his grantors.

It is likewise contended, that if a covenant legally existed in this case, and was broken, assumpsit lies to recover back the money. That form of action seems at times justified on general principles, beside the rule that in New York the remedy must be assumpsit on an instrument like this. 9 Mees. & W., 54; 4 Man. & G., 11; 5 Ad. & Ell., 433; 6 East, 241. To this the chief objection urged is, that neither assumpsit nor covenant will lie, in case no covenant whatever was made or broken. 3 Bos. & P., 170; 2 Johns. (N. Y.), Ch., 515; 4 Kent Com., 474; 3 Ves., 235.

But as the facts here do not require a decision on this last point, none is given.

The next instruction to which the original defendant objected, and which is the chief and most difficult one that can properly be considered by us, under the present bill of exceptions, is, that the power of attorney by Le Roy and his wife to Starr, their agent, was broad enough to confer upon him "authority to give a deed of the land with covenant of warranty."

This power of attorney is given *in extenso* in the statement
*466] of the case. It appears from its contents, that Le Roy, after *authorizing Starr to invest certain moneys in lands and real estate in some of the Western states and territories of the United States, at the discretion of the said Starr, empowered him "to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased by the said Starr," and "on such terms in all respects as the said Starr shall deem most advantageous." Again, he was authorized to execute "deeds of conveyance necessary for the full and perfect transfer of all our respective right,

[1] Cited. *Pritchard* v. *Norton*, 16 Otto, 133.

title," &c., "as sufficiently in all respects as we ourselves could do personally in the premises," "and generally, as the agent and attorney of the said Jacob Le Roy," to "sell on such terms in all respects as he may deem most eligible."

It would be difficult to select language stronger than this to justify the making of covenants without specifying them *eo nomine*. When this last is done, no question as to the extent of the power can arise, to be settled by any court. But when, as here, this last is not done, the extent of the power is to be settled by the language employed in the whole instrument, (4 Moo., 448,) aided by the situation of the parties and of the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing and throwing light on the question.

That the language above quoted from the power of attorney is sufficient to cover the execution of such a covenant would seem naturally to be inferred, first, from its leaving the *terms* of the sale to be in all respects as Starr shall deem most advantageous. "Terms" is an expression applicable to the conveyances and covenants to be given, as much as to the amount of, and the time of paying, the consideration. *Rogers* v. *Kneeland*, 10 Wend. (N. Y.), 219. To prevent misconception, this wide discretion is reiterated. The covenants, or security as to the title, would be likely to be among the terms agreed on, as they would influence the trade essentially, and in a new and unsettled country must be the chief reliance of the purchaser.

To strengthen this view, the agent was also enabled to execute conveyances to transfer the title "as sufficiently in all respects as we ourselves could do personally in the premises." And it is manifest, that inserting certain covenants which would run with the land might transfer the title in some events more perfectly than it would pass without them; and that, if present "personally," he could make such covenants, and would be likely to if requested, unless an intention existed to sell a defective title for a good one, and for the price of a good one. It is hardly to be presumed that any thing so censurable as this was contemplated.

*Again, his authority to sell, "on such terms in all respects as he may deem most eligible," might well be [*467 meant to extend to a term or condition to make covenants of seizin or warranty, as without such he might not be able to make an eligible sale, and obtain nearly so large a price.

Now all these expressions, united in the same instrument, would *primâ facie*, in common acceptation, seem designed to convey full powers to make covenants like these. And althoug

a grant of powers is sometimes to be construed strictly, (Com. Dig., *Poiar*, B. 1 and c. 6; 1 Bl. R., 283), yet it does not seem fit to fritter it away in a case like this, by very nice and metaphysical distinctions, when the general tenor of the whole instrument is in favor of what was done under the power, and when the grantor has reaped the benefit of it, by receiving a large price that otherwise would probably never have been paid. *Nind* v. *Marshall*, 1 Brod. & B., 319; 10 Wend. (N. Y.), 219, 252. This he must refund when the title fails, or be accessory to what seems fraudulent. 1 J. J. Marsh. (Ky.), 292. Another circumstance in support of the intent of the parties to the power of attorney to make it broad enough to cover warranties, is their position or situation as disclosed in the instrument itself. *Solly* v. *Forbes*, 4 Moo., 448. Le Roy resided in New York, and Starr was to act as his attorney *in* buying and selling lands in the "Western states and territories," and this very sale was as remote as Milwaukie, in Wisconsin. For aught which appears, Le Roy, Beard, and Starr were all strangers there, and the true title to the soil little known to them, and hence they would expect to be required to give warranties when selling, and would be likely to demand them when buying.

The usages of this country are believed, also, to be very uniform to insert covenants in deeds. In the case of the *Lessee of Clarke* v. *Courtney*, 5 Pet., 349, Justice Story says,—"This is the common course of conveyances;" and that in them "covenants of title are usually inserted." See also 6 Hill (N. Y.), 338. Now, if in this power of attorney no expression had been employed beyond giving an authority to sell and convey this land, saying nothing more extensive or more restrictive, there are cases which strongly sustain the doctrine, that, from usage as well as otherwise, a warranty by the agent was proper, and would be binding on the principal.

It is true, that some of these cases relate to personal estate, and some perhaps should be confined to agents who have been long employed in a particular business, and derive their authority by parol, no less than by usage; and consequently may not
*468] be decisive by analogy to the present case. 3 T. R., 757; **Helyear* v. *Hawke*, 5 Esp. Cas., 72, *n.*; *Pickering* v. *Bush*, 15 East, 45; 2 Camp., N. P., 555; 6 Hill (N. Y.), 338; 4 T. R., 177.

So of some cases which relate to the quality, and not the title, of the property. *Andrews* v. *Kneeland*, 6 Cow. (N. Y.), 354; *The Monte Allegre*, 9 Wheat., 648; 6 Hill (N. Y.), 338.

But where a power to sell or convey is given in writing and not aided, as here, by language conferring a wide discre-

tion; it still must be construed as intending to confer all the usual means, or sanction the usual manner of performing what is intrusted to the agent. 10 Wend. (N. Y.), 218; *Howard* v. *Baillie*, 2 H. Bl., 618; Story on Agency, p. 58; *Dawson* v. *Lawley*, 5 Esp. Cas., 65; *Ekins* v. *Maclish*, Amb., 186; Salk., 283; *Jeffrey* v. *Bigelow*, 13 Wend. (N. Y.), 527; 6 Cow. (N. Y.), 359. Nor is the power confined merely to "usual modes and means," but, whether the agency be special or general, the attorney may use appropriate modes and reasonable modes; such are considered within the scope of his authority. 6 Hill (N. Y.), 338; 2 Pick. (Mass.), 345; Bell on Com. L., 410; 2 Kent Com., 618; *Vanada* v. *Hopkins*, 1 J. J. Marsh. (Ky.), 287; *Sandford* v. *Handy*, 23 Wend. (N. Y.), 268. We have already shown, that, under all the circumstances, a covenant of warranty here was not only usual, but appropriate and reasonable.

Again, "all powers conferred must be construed with a view to the design and object of them." 1 J. J. Marsh. (Ky.), 287. Here that design was manifestly in the discretion of the agent, to sell as he might deem most advantageous. Again, if a construction be in some doubt, not only may usage be resorted to for explanation, (Story on Agency, p. 73; 5 T. R., 564,) but the agent may do what seems from the instrument plausible and correct; and though it turn out in the end to be wrong, as understood by the principal, the latter is still bound by the conduct of the agent. *Lomax* v. *Cartwright*, 3 Wash. C. C., 151; 2 Id., 133; 4 Id., 551; 6 Cow. (N. Y.), 358, in *Andrews* v. *Kneeland*. Because the person who deals with the agent is required like him to look to the instrument to see the extent of the power (7 Barn. & C., 278; 1 Pet., 290); and if it be ambiguous, so as to mislead them, the injurious consequences should fall on the principal, for not employing clearer terms. 2 Barn. & Ald., 143, in *Baring* v. *Corrie*; 1 Pet., 290; *Courcier* v. *Ritter*, 4 Wash. C. C., 551; 23 Wend. (N. Y.), 268.

In the next place, the acts of the parties themselves tend here to strengthen the construction of the words in the power, so as to authorize a warranty, and these acts, it is competent to consider in order to remove doubt. 17 Pick. (Mass.), 222; 1 Metc. (Mass.), 378; Paley on Agency, 198; *Mechanics' Bank of Alexandria* v. **Bank of Columbia*, 5 Wheat., [*469 326; and Bac. Abr. *Covenant*, F.; 5 T. R., 564; 1 Greenl. on Ev., § 298.

The agent's acts on this subject are strong. He construed the instrument as if empowering him to make the warranty, and made it accordingly. He was to gain nothing for himself

by such a course, if wrong, and does not appear to have done it collusively with any body. 2 Bro. Ch., 638.

The principal, too, when asked for redress, and when corresponding on the subject, does not appear to have set up as a defence, that he did not intend, by this instrument, to authorize a conveyance with warranty. On the contrary, for some time he conducted himself towards both the agent and the plaintiff, as if he had meant covenants should be made. 14 Johns. (N. Y.), 238; *All Saints Church* v. *Lovett*, 1 Hall (N. Y.), 191.

Finally, the decided cases on this question, though in some respects contradictory, present conclusions as favorable to this construction, as do the peculiar language used in the power and the weight of analogy. See 23 Wend. (N. Y.), 260, 267, 268; *Nelson* v. *Cowring*, 6 Hill (N. Y.), 336; *Vanada* v. *Hopkins's Ad.*, 1 J. J. Marsh. (Ky.), 293; 13 Wend. (N. Y.), 521, *Semble.*

Some earlier cases were contra. *Nixon* v. *Hyserott*, 5 Johns. (N. Y.), 58; *Van Eps* v. *Schenectady*, 12 Id., 436; and *Ketchum* v. *Evertson*, 13 Id., 365; 7 Id., 390.

But in these the power was merely to give a deed of a certain piece of property, and could be construed as it was, without directly impugning our views here. Whereas, in the present case, the power was manifestly broader in terms and design. *Wilson* v. *Troup*, 2 Cow. (N. Y.), 195; 6 Id., 357.

The earlier cases in New York, bearing on this subject, are also considered by its own courts as overruled by the later ones. Bronson, J., in 6 Hill (N. Y.), 336.

It may be proper to add, that the general conclusions to which we have arrived are more satisfactory to us, if not more right, because they accord with what appears to be the justice of the case, which is, that the plaintiff should not keep money which would probably not have been obtained except by these very covenants, and which it must be inequitable, therefore, to retain and at the same time avoid the covenants.

The judgment below is affirmed.

Mr. Justice McLEAN dissented.

Order.

This cause came on to be heard on the transcript of the *470] record from the Circuit Court of the United States for the Southern *District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs, and damages at the rate of six per centum per annum.

GEORGE D. PRENTICE AND GEORGE W. WEISSINGER, CO-PARTNERS DOING BUSINESS UNDER THE STYLE AND FIRM OF PRENTICE & WEISSINGER, PLAINTIFFS IN ERROR, *v.* PLATOFF ZANE'S ADMINISTRATOR.

Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, this court will not render a judgment, but remand the cause to the court below for a *venire facias de novo*.[1]

Therefore, where a suit was brought by an indorsee upon a promissory note, and the special verdict found that the original consideration of the note was fraudulent on the part of the payee, but omitted to find whether the holder had given a valuable consideration for it or received it in the regular course of business, and the court below gave judgment for the defendant, this court could not decide whether that judgment was erroneous or not, and would have been compelled to remand the case.

But the parties below agreed to submit the cause to the court, both on the facts and the law. This court must presume that the court below founded its judgment upon proof of the fact as to the manner in which the holder received it, and must therefore affirm the judgment of the court below.

THIS case was brought up by writ of error from the District Court of the United States for the Western District of Virginia.

In 1836, Platoff Zane, a citizen of Virginia, being in Pennsylvania, executed the following promissory note:—

"$5,437$\frac{50}{100}$. Philadelphia, November 28th, 1836. Five years after date, I promise to pay to the order of James H. Johnson, five thousand four hundred and thirty-seven $\frac{50}{100}$ dollars, without defalcation, for value received.

"PLATOFF ZANE."

On some day afterwards (the record did not show when), this note was indorsed in blank by Johnson, the payee, and delivered to John Stivers, who handed it over to Prentice & Weissinger, without putting his own name upon it.

On the 8th of May, 1840, Prentice & Weissinger filed a bill before the Honorable George M. Bibb, judge of the Louisville Chancery Court in Kentucky, against the above-named John Stivers and one John Thomas. The bill stated, that the complainants and Thomas were sureties for Stivers as principal in a debt which Stivers owed to the Bank of Louisville, that the complainants had paid the debt, and now required Thomas to contribute one half.

[1] FOLLOWED. *Graham* v. *Bayne*, How., 441; *Stickney* v. *Wilt*, 23 Wall., 18 How., 63; *Guild* v. *Frontin*, Id., 135. 163; *Stewart* v. *Salamon*, 7 Otto, 364.
CITED. *Suydam* v. *Williamson*, 20

*On the 16th of June, 1840, Thomas answered, and also filed a cross-bill. He alleged that Stivers had placed in the hands of Prentice & Weissinger a large amount of securities, and required an exhibition thereof. Weissinger answered the cross-bill, and gave in a list of these securities, amongst which was Zane's note; to which was attached the remark, that they had received notice that the note would be defended on the ground of no consideration. The answer also offered to transfer all the securities to Thomas for eighty per cent. of their amount, averring a belief of their insufficiency to pay the debt.

Here these proceedings in chancery stopped.

On the 7th of November, 1845, Prentice & Weissinger, citizens of Louisville, Kentucky, brought an action of debt against Zane, in the District Court of the United States for the Western District of Virginia, upon the above-mentioned promissory note.

The defendant pleaded *nil debet*, and the case went to a jury, who found a special verdict. Before reciting this, it may be mentioned that the deposition of Jacob Anthony, therein referred to, proved that the note in question was passed by Stivers to Prentice & Weissinger, to indemnify them for money paid by them, as his indorsers, in bank.

The jury say, that they find that the note in these words—"$5,487 $\frac{50}{100}$. Philadelphia, November 28th, 1836. Five years after date, I promise to pay to the order of James H. Johnson, five thousand four hundred and thirty-seven $\frac{50}{100}$ dollars, without defalcation, for value received. Platoff Zane"—was made by the defendant, and delivered to the payee, at the date thereof, at Philadelphia, in the state of Pennsylvania, and that said note was indorsed by the payee, and delivered by him, so indorsed, to one John Stivers, at the city of Louisville, in the state of Kentucky, before the maturity thereof; that there has not been any evidence submitted to us that said Stivers paid value therefor, or that there was any consideration for such indorsement, unless the same ought to be inferred from the matters herein stated; but should the court be of opinion that, from the facts and evidence herein found, the jury ought to presume that said indorsement to said Stivers was made for a valuable consideration, then we find that the same was made for full value received by the payee from said Stivers therefor; otherwise we find that the same was made without any consideration or value therefor. And we further find, that said Stivers afterwards, but before the said note became payable, delivered the same (indorsed in blank by the

payee as aforesaid, but not indorsed by the said Stivers) to the plaintiffs, at the city of Louisville aforesaid, for the purposes and upon the *consideration shown in the deposition of Jacob Anthony, and the record of a bill, answer, and cross-bill and answers; which deposition and record are in the words and figures following, to wit: (The deposition and record were then set forth *in extenso*, and the special verdict proceeded thus:)

We further find, that the consideration of said note was fraudulent on the part of the payee, and such that the payee could not recover against the maker upon said note.

But we further find, that the plaintiffs had no notice of the fraudulent consideration of said note at or before the time the same was delivered to them as aforesaid.

And we find that the defendant, since the institution of this suit, has duly served the plaintiffs with a notice in the following words, to wit:—

"An action of debt, in the District Court of the United States for the Western District of Virginia, between

"PRENTICE & WEISSINGER, Plaintiffs,
and
PLATOFF ZANE, Defendant.

"The defendant in this suit will offer evidence to show, and will insist at the trial, that the note described in the declaration was obtained from him, said defendant, by the payee thereof, by means of misrepresentation and fraud, and without any value having been received therefor by said defendant, and will require the plaintiffs to prove at the trial the consideration, if any, paid by them, or the previous holder or holders thereof, for the same, and the time and manner in which they became possessed of said note. Very respectfully, &c.,

PLATOFF ZANE,
By JACOB & LAMB, *his Attorneys.*

"To MESSRS. PRENTICE & WEISSINGER."

"Due service of above admitted.

"M. C. GOOD, *Attorney for Plaintiffs.*"

We further find the statute of Pennsylvania in force within that state at the time of the execution of said note, and the indorsement thereof and delivery of the same to the plaintiffs as aforesaid, in these words:—

"Act of 27th February, 1797.—4 Dall., 102; 3 Smith, 278

"An Act to devise a particular Form of Promissory Notes not liable to any Plea of Defalcation or Set-off.

"6. SEC. 1. All notes in writing, commonly called promissory notes, bearing date in the city or county of Philadelphia, *whereby any person or persons, bodies politic or corporate, or copartnership in trade, shall promise to pay, or cause to be paid, to any other person or persons, bodies politic or corporate, or copartnership in trade, and to the order of the payee for value in account, or for value received, and in the body of which the words 'without defalcation,' or 'without set-off,' shall be inserted, shall be held by the indorsees discharged from any claim of defalcation or set-off by the drawers or indorsers thereof; and the indorsees shall be entitled to recover against the drawer and indorsers such sums as, on the face of the said notes, or by indorsements thereon, shall appear to be due: Provided always, that in every action brought by the holder of any such note, whether against the drawer or indorsers, the defendant may set off and defalk so far as the plaintiffs shall be justly indebted to him in account by bonds, specially, or otherwise."

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(See 8 Serg. & R. (Pa.), 481, and posted notes.)

"A copy from a copy filed in my office.

"Teste: ALEXANDER T. LAIDLEY, *Clerk.*"

And if the law be for the plaintiffs, then we find for them the sum of $5437.50, the debt in the declaration mentioned, with interest thereon at the rate of six per cent. per annum from the 1st day of December, 1841, till paid. But if the law be for the defendant then we find for the defendant.

T. W. HARRISON.

And because the court will consider of what judgment should be rendered upon the verdict aforesaid, time is taken until to-morrow.

Memorandum. Upon the trial of this cause, the parties, by their attorneys, filed a written agreement in the words following, to wit:—"And the parties agree that the court, in deciding upon the foregoing verdict, shall look to and regard the decisions of the courts of the state of Pennsylvania, as found in the several printed volumes of the reports thereof, to avail as much as if the same were found by said verdict, and to have such weight as in the judgment of the court they ought to have; and the parties further agree to waive all objections to said verdict on account of its finding in part evidence, and not fact. And that the court, in deciding thereupon, may make all just inferences and conclusions of fact and law from

the evidence and facts therein stated, and the decisions aforesaid, which, in the opinion of the court, a jury ought to draw therefrom, if the same were submitted to them upon the trial of this cause; and that *this agreement is to be made part of the record in this suit. [*474

"M. C. GOOD, *Attorney for Plaintiffs.*
JACOB & LAMB, *Attorneys for Defendant.*"

Which agreement is ordered to be made a part of the record in this suit.

On the 9th of September, 1846, the District Court pronounced the following judgment, viz.:—"The matters of law arising upon the special verdict in the cause being argued at a former term of this court, and the court having maturely considered thereof, it seems that the law is for the defendant."

A writ of error brought the case up to this court.

It was argued by *Mr. Badger* and *Mr. Bibb*, for the plaintiffs, and *Mr. Ewing*, for the defendant.

The points raised by *Mr. Bibb*, for the plaintiffs in error, were the following:

The legal right of the plaintiffs to have judgment for the sum expressed in the note stands,—1st, upon the effect of the act of 1797, as declared in the title, body, soul, and spirit of the act itself; 2d, upon principles well established by adjudged cases, which confirm and fortify their right.

I. The true meaning and effect of that act, to be collected from the expressions of the act itself, stand in the foreground.

It may be useful, and will be according to the usages of the sages of the law in expounding statutes, to look into the old law, the inconveniences and grievances arising under it, thereby the better to understand the remedy intended by the new law, so that the mischiefs may be suppressed, and the remedy advanced.

The Legislature of Pennsylvania, on the 28th May, 1715, passed "An act for the assigning of bonds, specialties, and promissory notes." (1 State Laws, p. 77.) The inconveniences growing out of the provisions of that act, in the remedies allowed to assignees, will be sufficiently understood, for all the present purposes, by looking into the decisions of the courts in these cases, viz.:—*Wheeler, Assignee*, v. *Hughes*, in 1776 (1 Dall., 28;) *M'Cullough, Assignee*, v. *Houston*, in 1789 (1 Id., 441;) *Stille* v. *Lynch*, in 1792 (2 Id., 194.)

By these decisions it appears that the statute of 8 and 4 Anne, chap. 9, respecting assignments, was not considered as

in force, *ex proprio vigore*, in Pennsylvania; and that the act of Pennsylvania of 1715 differed materially from the statute of Anne, especially in omitting to allow promissory notes to be negotiated and assigned in like manner as bills of exchange.

*475] *The assignee took the assignment of a bond, specialty, or promissory note, under the act of 1715, at his peril, and stood in the place of the payee, "so as to let in every defalcation which the obligor had against the payee at the time of the assignment, or notice of the assignment." "The only intent of the act being to enable the assignee to sue in his own name, and prevent the obligee from releasing after assignment," (1 Dall., 28,) "subject to all equitable considerations to which the same was subject in the hands of the original payee." (1 Id., 444.)

In *Stille* v. *Lynch*, 2 Dall., 194, the maker of a promissory note was permitted, in an action by the indorsee, to set up in defence, that the note was without any consideration. This trial was had at the September term of that court, in the year 1792.

On the 30th of March, 1793, the Legislature of Pennsylvania passed an act, (3 Dallas State Laws, p. 329), by which promissory notes discounted at the Bank of Pennsylvania were placed upon the footing of foreign bills of exchange, except as to damages. Whereby such discounted notes became discharged, in the hands of the indorsee, from any plea of defalcation or set-off on account of the transactions between the original parties. But similar notes, not discounted at bank, were in the hands of indorsees, under the act of 1715, subject to all equities existing between the original parties "at the time of the assignment, or notice of the assignment."

Such peculiar rights, privileges, and immunities, enjoyed by the President, Directors, and Company of the Bank of Pennsylvania, having their office of discount and deposit in the city of Philadelphia, but not accorded to others dealing in like promissory notes, and doing business in the vicinage of the bank and within the sphere of its influence, were inconveniences and grievances. Such differences and privileged anomalies, growing out of the positive acts of legislation by the state of Pennsylvania, called for some remedy.

Such were the old laws and their effects, when the act of 1797 was passed, "to devise a particular form of promissory notes, not subject to any plea of defalcation or set-off. This act, in its title and body, manifests the intent of the Legislature to enable the community to make for themselves promissory notes, which should be thereafter creditable, merchantable negotiable, indorsible, and circulated according to the general

principles and usages of the mercantile law, not subject, in the hands of indorsees, *bonâ fide* and for value, to any defal cation or set-off, not warranted by the established principles of the law merchant.

*The form devised contains, to the full, the terms to impart the characteristics and qualities of negotiable [*476 mercantile paper, expressed simply and aptly, in words well known to the law merchant, and intelligible to a common understanding. The notes are to bear date in the city or county of Philadelphia, to promise to pay money, to express the sum to be payable "to order," to express "for value received," and to be payable "without defalcation." Such notes, the act declares, "shall be held by the indorsees discharged from any claim of defalcation or set-off by the drawers or indorsers thereof."

That no ambiguity might exist as to what was meant by a "defalcation," that not a loop might remain whereon to hang a doubt to be solved by construction, the act has superadded, —"And the indorsees shall be entitled to recover against the drawer and indorsers such sum as on the face of the said notes, or by indorsements thereon, shall appear to be due."

The explanation proceeds,—"Provided, always, that in every action by the *holder* of any such note, whether against the drawer or indorsers, the defendant may set off and defalk, so far as the *plaintiffs* shall be indebted justly to him in account by bonds, specialty, or otherwise."

The proviso subjects every holder for his own acts, and no further. The first position and body to which the proviso is appended discharges the indorsee from any difficulty arising out of matters *inter alios acta*, not disclosed by the instrument itself,—not made known to the indorsee before he made a fair acquest of the note for value.

II. Upon the authority of adjudged cases, the right of the plaintiffs is confirmed and fortified against the defence set up.

(The counsel then referred to the following English authorities:—2 Burr., 276; Bl. Com., book 2, chap. 30, p. 470; 4 T. R., 148. Pennsylvania authorities:—4 Dall., 370; 5 Binn. (Pa.), 469; 1 Serg. & R., (Pa.), 180; 9 Id., 193. And a number of English cases; to show that the "general mercantile law" was in harmony with these decisions.)

In *Lickbarrow* v. *Mason*, 2 T. R., 71, Justice Ashurst stated the law to be,—"As between the drawer and payee, the consideration may be gone into; yet it cannot be between drawer and an indorsee; and the reason is, it would be enabling either of the original parties to assist in a fraud."

This same distinction between a defence impeaching the consideration, in actions between the original parties, in which

case it is admissible, and actions by indorsees and in which case such defence cannot be admitted, was adjudged in these cases:—*Snelling* v. *Briggs*, and *Collet* v. *Griffith*, Bull. N. P., *274; *Puget De Bras* v. *Forbes & Gregory*, 1 Esp. Cas., 119; *United States* v. *Bank of the Metropolis*, 15 Pet., 378; *Swift* v. *Tyson*, 16 Id., 15, 22.

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In the case of *Swift* v. *Tyson*, the defendant attempted to defend against the indorsee by showing that the consideration held out to the maker was, on the part of the payee, totally false and fraudulent. But the Supreme Court of the United States decided that "a *bona fide* holder of a negotiable instrument for valuable consideration, without any notice of the facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before it becomes payable, holds the title unaffected by those facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning now to be brought forward in its support.

"As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove that he is a *bona fide* holder for a valuable consideration without notice; for the law will presume that, in the absence of all rebutting proofs; and therefore it is incumbent on the defendant to establish his defence by proofs, to overcome the *primâ facie* title of the plaintiffs."

In the case of the *United States* v. *Bank of the Metropolis*, the Supreme Court of the United States said,—"The rule is, that a want of consideration between drawer and acceptor is no defence against the right of a third party who has given a consideration for the bill, and this even though the acceptor has been defrauded by the drawee, if that be not known by the third party before he gives value for it." (15 Pet., 393.)

The special verdict finds that Stivers (who received the bill from the payee indorsed in blank) did not indorse it, but delivered it to the plaintiffs. The want of Stivers's indorsement is no objection to the title of the plaintiffs. They had a right to fill up the blank indorsement by an assignment to themselves, as they did. (A number of cases cited. 11 Pet., 81, &c.)

The parties, by agreement of record, waive all objections to the verdict for "finding in part evidence, and not fact," and agree that the court "may make all just inferences and con-

clusions of fact and law from the evidence and facts therein stated, which a jury ought to draw therefrom."

Upon the deposition of Anthony, and the bill, answer, cross-bill, *and answers, between Prentice & Weissinger, as original complainants, and John Thomas, to compel him to contribute for the debt for which the parties were bound as co-securities for Stivers as principal, and paid by Prentice & Weissinger; and the cross-bill by *Thomas* v. *Prentice & Weissinger*, to account for the notes by them received of Stivers, and the answer of Prentice & Weissinger to the cross-bill; it appears that Prentice & Weissinger had paid as indorsers and securities for Stivers upwards of twelve thousand dollars, and that this note and others were delivered over to Prentice & Weissinger in consideration of the moneys so previously paid by them for Stivers, and as indemnities; from which, however, they are not likely to be saved from loss by all the securities which Stivers gave them. [*478

It is clear from the transcript of the record of the suit in chancery, and the deposition of Anthony, as found by the special verdict, that the note upon P. Zane was delivered by Stivers to the plaintiffs, in consideration of a precedent debt, greatly exceeding the sum due by this promissory note.

The question is, whether the possession so obtained by the plaintiffs of this negotiable note, in consideration of a precedent debt, entitles them to protection as indorsees against the defence set up by the maker, on account of the transactions between them and the payee?

This question was fully argued and decided by this court in the case of *Swift* v. *Tyson*, 16 Pet., 2, 16, 20, 21, 22. It was thereupon resolved by the court, that a preëxisting debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. The question was examined upon principle, and upon the adjudged cases, English and American; and the conclusion is, "that a *bonâ fide* holder taking a negotiable note in payment of, or as security for, a preëxisting debt, is a holder for a valuable consideration, entitled to protection against all equities between the antecedent parties." To sustain that doctrine many cases are cited by the court previously decided in the Supreme Court of the United States, and in England, and the opinion in that case says of them:—"They go farther, and establish, that a transfer as *security* for past, and even for future *responsibilities*, will, for this purpose, be a sufficient, valid, and valuable consideration." (16 Pet., 21.)

This decision, and the authorities therein cited by the court.

are full and conclusive. Nothing can be, or need be, added on this point by the counsel for the plaintiffs.

*479] The special verdict submits to the court the question whether, "in the absence of all positive proof upon the subject of the consideration between Johnson and Stivers for the note, it is to be presumed that Stivers gave value for it.

The presumption is so until repelled by proof to the contrary; as stated in *Swift* v. *Tyson*, 16 Pet., 16. But the question is immaterial whether or not Stivers paid value to Johnson, seeing that the plaintiffs are holders *bonâ fide*, for value, and without notice, and obtained the note regularly in the direct line of negotiation.

In *Haley* v. *Lane*, 2 Atk., 182, Lord Hardwicke determined, that, "where there is a negotiable note, and it comes into the hands of a third or a fourth indorsee, though some of the former indorsers might not pay a valuable consideration for it, yet it is a good note to him, unless there should be some fraud, or equity appearing against him in the case."

In the cases of *Grant* v. *Vaughan*, 3 Burr., 1516; *Anonymous*, 1 Salk., 126, plea 5; *Miller* v. *Race*, 1 Burr., 452; and *Peacock* v. *Rhodes*, 2 Doug., 632; the negotiable papers passed through the hands of mere finders and thieves into the possession of *bonâ fide* holders for valuable consideration without notice, yet such valueless and vicious derivatives did not impair the rights and titles of such *bonâ fide* possessors.

The special verdict finds that this note was made and delivered in Philadelphia, and indorsed and delivered in Louisville by the payee to Stivers, and by Stivers delivered to the plaintiffs in Louisville. So this note was made and delivered in one state, negotiated in another, and sued upon in a third.

The note so made in Pennsylvania, having no reference by its terms to performance in any other state, must be adjudged by the laws of that state, and was there a good and valid contract. By the law of that state, it was a mercantile negotiable instrument. The act of the legislature found by the jury and the decisions of the Supreme Court of that state, before cited, (5 Binn. (Pa.), 469, 1 Serg. & R. (Pa.), 180, and 9 Id., 198,) show that this note and all such like are, by the law of that state, negotiable according to the principles of the "general mercantile law;" that such notes are "in the situation of bills of exchange;" that the act of 1797, relating to such promissory notes, was passed "for the purpose of making them subject to the rules of general mercantile law." The supreme judicial tribunal of that state has so expounded the statute and settled its meaning and effect.

The points were thus stated by *Mr. Badger*, upon the same side.

*It will be also insisted for the plaintiff, that,— [*480

1st. Every holder of a bill or note is presumed to be a *bonâ fide* holder for value, until something is shown to repel the presumption. Story on Prom. Notes, p. 220, § 196; Story on Bills of Exch., p. 492, § 415.

2d. Every person in possession of a bill or note, indorsed in blank, and appearing to be the lawful holder thereof, can by delivery convey a good title thereto to any one believing him to be such owner, so as to convey a right of action against the maker or acceptor, notwithstanding the want of consideration, or any other matter of defence, as between the previous parties to the bill or note. *Arbouin* v. *Anderson*, 1 Ad. & Ell., N. S., 498; Story on Bills, § 415.

3d. To repel the presumption that the holder came by the bill or note honestly, fraud, felony, or some such matter, must be proved, and a holder for value is not affected by any infirmity in the bill or note, or in the previous negotiations thereof, unless *mala fides* is brought home to him. *Knight* v. *Pugh*, 4 Watts & S. (Pa.), 445; *Goodman* v. *Harvey*, 4 Ad. & Ell., 870; *Arbouin* v. *Anderson*, above cited; Story on Bills, §§ 415, 416.

And as a consequence from these positions, it will be insisted that the plaintiff in error is entitled to recover.

And even upon the doctrine once held, that gross negligence or even ground of suspicion is sufficient to affect the holder, (Story on Prom. Notes, § 195; Story on Bills, § 416; *Goodman* v. *Harvey*, above cited,) the plaintiff in error is here entitled to recover, there being in this case neither such negligence nor ground of suspicion.

Mr. Ewing, for defendant in error.

1st. This suit was brought in Virginia, on a promissory note, by the assignee, against the maker. It is not averred in the declaration that the note was made in any other state or community, or that it is affected by any law or usage other than the laws and usages of Virginia. There being no such averment, there can be no such proof or fact found legally in the case, for it makes a different contract, governed by different legal principles. The case, therefore, stands as it is set out in the declaration. A suit upon a note made in Virginia, and controlled by the laws and usages of Virginia. By these, a promissory note is not a commercial instrument, and the fraud of the payee in obtaining the note may be set up against the indorser.

The special verdict finds that the note was obtained by fraud. This is enough to sustain the judgment of the *481] court below. *But if the declaration be out of the question, and the case rest upon the special verdict, irrespective of the pleadings, then the note is commercial paper, and the special verdict finds that it was fraudulently obtained.

The plaintiffs are indorsees; but pending the case in the courts below, they had due notice that the note was obtained by fraud, and that they would be called upon on the trial to prove the consideration paid for the note.

Commercial paper which is obtained by fraud is subject to the same defence in the hands of the assignee as in those of the payee, unless he show that it was transferred to him for a valuable consideration, in the due course of trade. *Holme* v. *Karpser*, 5 Binn. (Pa.), 469; *Morton* v. *Rogers*, 14 Wend. (N. Y.), 580; 2 Barn. & Ad., 291; 4 Taunt., 114; Chit. on Bills, 69, and cases cited in notes.

The verdict does not find that the plaintiffs gave any consideration for the note, or received it in any fair transaction, except as the same may be deduced from evidence to which it refers. This evidence must be treated as a nullity, were it not for the agreement of counsel, that the court, in deciding the case, may make all just inferences and conclusions of fact and law from the evidence. Conclusions of fact, deduced by the court from the evidence, cannot be a subject of reversal. This court deals with errors in law.

The jury, therefore, not having found any consideration for the assignment of the note, the judgment cannot be reversed because the court below did not infer a consideration from evidence which, by agreement of counsel, it was to pass upon. The record does not show whether the court inferred any consideration for the transfer or not. This court cannot assume that they did infer any. The jury did not find any. So that the facts found leave a clear case of a note obtained by fraud, and transferred without consideration. The evidence referred to cannot change it here, as this court has nothing to do with evidence.

The counsel for the plaintiffs contend that this must be considered as an agreed case, not as a special verdict. This does not help the matter in the least. If it be an agreed case, it is agreed in it that, so far as the jury find facts, the court shall pronounce the law upon them. So far as they find evidence, the court shall infer from it the facts, and pronounce the law upon the facts so inferred. It is *pro tanto* a submission to the court upon the evidence.

But if this court look to and pass upon the evidence, which was by consent submitted to the court below, then the [*482 case *made out is that of a note obtained by fraud, transferred to the plaintiff as security for a pre-existing debt, no consideration being paid for the note, no debt extinguished by its transfer.

We admit and contend that the liability of the maker of this note is governed by the laws of Pennsylvania; and if by the statutes, as expounded by the courts of that state, he is allowed to set up the defence here set up, he is entitled to do so, notwithstanding it has been indorsed in another state. Story's Confl. of Laws, §§ 317, 332, 333, 345; Story on Bills, §§ 158, 161, 163, 164, 167, 168, 169; Judiciary Act, 1789; *Shelby* v. *Guy*, 11 Wheat., 361; *Green* v. *Neal*, 6 Pet., 291; *Elmendorf* v. *Taylor*, 10 Wheat., 152; 12 Pet., 89.

According to the law of Pennsylvania, the defence of fraud in the consideration of this note may be set up against an indorsee who has received it merely as collateral security for a pre-existing debt. *Petrie* v. *Clark*, 11 Serg. & R., 377; *Walker* v. *Geisse*, 4 Whart., 257, 258; *Depeau* v. *Waddington*, 6 Id., 232; *Jackson* v. *Polack*, 2 Miles, 362; and see 4 Whart., 500; and *Evans* v. *Smith*, 4 Binn., 366; *Cromwell* v. *Arrot*, 1 Serg. & R., 180.

In Virginia there has been no decision of the question, as one of general commercial law affecting negotiable paper; but see 2 Rand., 260; 2 Leigh, 503; and *Prentice & Weissinger* v. *Zane*, 2 Gratt., 262.

In Kentucky notes are not negotiable unless negotiated by a bank. (1 Marsh., 540; 3 Id., 162.) No decision of the courts of that state has been found upon the question whether the indorsee of negotiable paper, in a case like this, holds it discharged of all equities between the original parties. At all events, it has been shown that the local law of that state would not affect the liability of this defendant.

In New York negotiable paper is on the same footing as in Pennsylvania, when received as collateral security for an existing debt. *Bay* v. *Coddington*, 5 Johns. Ch., 56; and the same case, in error, 20 Johns., 643; 9 Wend., 170; 6 Hill, 93; 24 Wend., 230.

In New Hampshire, see 10 N. H., 266; 11 Id., 66. In Alabama, 4 Ala. In Tennessee, 10 Yerg., 428, 434.

In England the most of the cases have been those of bankers, who probably make advances to their customers upon an understanding, in all cases, that they shall be covered by bills; or advances are made on the credit of the bills. See 1 Stark., 1; 8 Ves., 531; 4 Bing., 396; 1 Bing. N. C.,

469; 16 Eng. Com. Law, 256; 17 Id., 356; *Vallace* v. *Siddell*, Chit. on Bills, 87, 88 (10th Am. ed.) *De la Chaumette* v. *Bank of England*, 9 *Barn. & C., 209 (17 E. C. L., 356), seems to sustain the doctrine for which we contend.

*488]

Numerous cases, in this court and elsewhere, which seem, perhaps, to affect the present question, really turn upon the circumstance, that the bill or note has been received in payment of the pre-existing debt, and not as collateral security; or that advances have been made, or some other consideration given, at the time of taking the note; as *Swift* v. *Tyson*, 16 Pet., 1; 2 Id., 170; 2 Wheat., 66; *Brush* v. *Scribner*, 11 Conn., 388; 12 Pick. (Mass.), 399; 22 Id., 24; 11 Ohio, 172; &c. Even in Pennsylvania, (4 Whart., 258,) and now in New York, (21 Wend., 499; 23 Id., 311; 24 Id., 115; 1 Hill, 513; 2 Id., 140,) it is held, that, if the indorsee receives a bill in payment or discharge of a pre-existing debt, he holds it exempt from all equitable defences; but not if he has taken it merely as collateral security for such a debt. See *Munn* v. *M'Donald*, 10 Watts (Pa.), 270.

The opinion of Story, J., in *Swift* v. *Tyson*, on this point, is *obiter*, and is not sustained by the authorities in England or America. It is directly opposed to the Pennsylvania cases, which, as expositions of a statute of that state, or of the commercial law prevailing there, must be conclusive.

The protection given to indorsees of negotiable paper is analogous to, and perhaps derived from, the doctrine of courts of equity, in cases where a purchaser has obtained the legal title without notice of equitable right. In such cases, if the legal title has been transferred as a mere security for a pre-existing debt, it cannot be retained against a prior equitable owner. 6 Hill (N. Y.), 96; 22 Pick. (Mass.), 243; 4 Paige (N. Y.), 221; 6 Id., 648, 466; 4 Whart. (Pa.), 506.

It is just that the defence here should be sustained; because the defendant received nothing, the plaintiffs really paid nothing for the note, and therefore it is iniquitous to require the defendant to pay the plaintiff some nine or ten thousand dollars, merely because he signed, and they hold, the paper.

The general commercial law does not exclude the defence. The law of Virginia, where the suit was brought, or (so far as we know) of Kentucky, where the plaintiffs took the note, does not exclude it. In neither of those states is the note negotiable by their own law. (2 Leigh (Va.), 198; 6 Munf. (Va.), 316; 1 Call (Va.), 226, 497; 2 Wash. (Va.), 219.) Therefore the plaintiffs are driven to rely on the statute of Pennsylvania; and that, as expounded by the courts of that state, does not sustain them.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiffs in error were plaintiffs below. They [*484 declared *on a promissory note given by defendant to James H. Johnson, or order, for the sum of $5437.59, payable five years after date. The note was indorsed by the payee and delivered to John Stivers, who delivered it to the plaintiffs. The defendant pleaded *non assumpsit*, and a jury being called, found a special verdict, setting forth the note, and finding that it was made by the defendant and delivered by him to the payee, but that "the consideration was fraudulent on the part of the payee;" that the note was indorsed by the payee to John Stivers before its maturity, "and that there has not been any evidence submitted to the jury that said Stivers paid value therefor, or that there was any consideration for such indorsement, unless the same ought to be inferred from the matters herein stated," &c. They also find that Stivers delivered the note to plaintiffs, but without saying whether for a valuable consideration or not; and they refer the court to the deposition of a witness and the record of a chancery suit appended to the verdict for the evidence on that point.

This special verdict is manifestly imperfect and uncertain, as it finds the evidence of facts, and not the facts themselves.[1]

A verdict, says Coke (Co. Litt., 227, *a*), finding matter uncertainly and ambiguously, is insufficient, and no judgment will be given thereon.

A verdict which finds but part of the issue and says nothing as to the rest is insufficient, because the jury have not tried the whole issue. So, if several pleas are joined, and the jury find some of them well, and as to others find a special verdict which is imperfect, a *venire facias de novo* will be granted for the whole. 2 Roll. Abr., 722, Pl. 19; *Auncelme* v. *Auncelme* Cro. Jac., 31; *Woolmer* v. *Caston*, Id., 113; *Treswell* v. *Middleton*, Id., 653; *Rex* v. *Hayes*, 2 Ld. Raym., 1518.

In all special verdicts, the judges will not adjudge upon any matter of fact, but that which the jury declare to be true by their own finding; and therefore the judges will not adjudge upon an inquisition or *aliquid tale* found at large in a special verdict, for their finding the inquisition does not affirm that all in it is true. *Street* v. *Roberts*, 2 Sid., 86.

In the *Chesapeake Ins. Co.* v. *Stark* (6 Cranch, 268), and *Barnes* v. *Williams* (11 Wheat., 415), this court have decided that, where in a special verdict the essential facts are not dis-

[1] FOLLOWED. *Graham* v. *Bayne*, 18 How., 63; *Guild* v. *Frontin*, Id., 135. CITED. *Suydam* v. *Williamson*, 20 How., 441; *Stickney* v. *Wiet*, 23 Wall., 163.

tinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below, with directions to award a *venire de novo*.

*485] The court in this case would have been bound to pursue the same *course, if the judgment of the court below had been rendered on the imperfect special verdict which the record exhibits. But it appears that the court and counsel were aware of this imperfection in the verdict, and that it was not such as would warrant any judgment thereon by the court. Nevertheless, the parties, instead of asking for a *venire de novo*, or amending the verdict, agree to waive the error, and to submit the cause to the court, both on the facts and the law. Their agreement is as follows:—

"*Memorandum*. Upon the trial of this cause the parties, by their attorneys, filed a written agreement in the words following, to wit:—'And the parties agree that the court, in deciding upon the foregoing verdict, shall look to and regard the decisions of the courts of the state of Pennsylvania, as found in the several printed volumes of the reports thereof, to avail as much as if the same were found by said verdict, and to have such weight as in the judgment of the court they ought to have; and the parties further agree to waive all objections to said verdict on account of its finding in part evidence, and not fact. And that the court, in deciding thereupon, may make all just inferences and conclusions of fact and law from the evidence and facts therein stated, and the decisions aforesaid, which, in the opinion of the court, a jury ought to draw therefrom if the same were submitted to them upon the trial of this cause; and that this agreement is to be made part of the record in this suit.'"

The judgment of the court below was rendered upon this submission, and not on the special verdict alone.

In cases at law, this court can only review the errors of the court below in matters of law appearing on the record. If the facts upon which that court pronounced their judgment do not appear on the record, it is impossible for this court to say that their judgment is erroneous in law. What "inferences or conclusions of fact" the court may have drawn from the evidence submitted to them, we are not informed by the record. The fact submitted to the judge formed the turning-point of the case. So far as the record exhibits the facts, no error appears. The note being found to have been obtained from the defendant by fraud, the plaintiff's right to recover on it necessarily depended on the fact that he gave some consideration for it, or received it in the usual course of trade.

We must presume that the court found this fact against the plaintiff; and if so, their judgment was undoubtedly correct. Whether their "inferences or conclusions of fact" were correctly drawn from the evidence, is not for this court to decide.

*That such has been the uniform course of decision in this court, may be seen by reference to a few of the many cases in which the same difficulty has occurred. In *Hyde* v. *Booraem* (16 Pet., 169), this court say,—"We cannot upon a writ of error revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence, or drew right conclusions from it. That is the proper province of the jury, or of the judge himself, if the trial by jury is waived. The court can only re-examine the law so far as he has pronounced it on a state of facts, and not merely on the evidence of facts found in the record in the making of a special verdict or an agreed case. If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before the Supreme Court, by an appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with supposed conclusions in matters of fact." See, also, *Minor* v. *Tillotson*, 2 How., 394, and *United States* v. *King*, 7 Id., 833. [*486

The judgment of the court below is therefore affirmed.

Mr. Justice McLEAN, Mr. Justice WAYNE, and Mr. Justice WOODBURY dissented.

Mr. Justice WAYNE.

I do not concur with the court in the course which it has taken in this case, or in affirming the judgment. The record in my view is irregular. It is difficult to say whether it has been brought to this court upon a special verdict, or a case stated by agreement of the parties; and I think it difficult to determine whether the court below acted upon either. It may have given its judgment *pro forma* to get the case to this court. I think a different direction ought to have been given to it, by returning the case to the District Court for amendment, so that the case might have been decided substantially upon its merits. This would have been according to what has been done by this court in other cases similarly circumstanced as this case is.

Mr. Justice WOODBURY.

I feel obliged to dissent from the judgment in this case. It is conceded that the special verdict is defective in form. Instead of stating some of the matter as a fact,—only the

evidence of it is given. The most obvious and proper course under such circumstances would seem to be, to send the case back, and give an opportunity to the plaintiff to have that *487] defect corrected, and afterwards, if the case comes up again, *to render judgment on the merits upon all the facts, when thus formally set out. This could regularly be done by reversing the judgment below, instead of affirming it, as here. That judgment was rendered erroneously on this same defective verdict, instead of putting it first in proper shape, and then deciding on it as corrected.

After the reversal here, we should, in my opinion, remand the case to the Circuit Court, not to have judgment entered there either way on this imperfect verdict, but to have a *venire de novo* ordered so as to correct it. Such I understand to be the well-settled practice of this court. As decisive proof that the course now pursued, of refusing to send the case back for correction before final judgment, is not in accordance with what has been done by this court in like cases, Chief Justice Marshall, in *Chesapeake Ins. Co.* v. *Stark*, 6 Cranch, 268, observed,—"In this case the jury have found an abandonment, but have not found whether it was made in due time or otherwise. The fact is therefore found defectively, and for that reason a *venire facias de novo* must be awarded." "Judgment reversed, and the cause remanded, with directions to award a *venire facias de novo*." Such was deemed the proper course there, rather than at once to give absolute and final judgment, as here, against the plaintiff, because the special verdict was defective. Another objection there was precisely as here, "because the jury have found the evidences of the authority and time, but not the fact of authority nor the reasonableness of the time." (p. 271.)

So again, in *Livingston* v. *Mar. Ins. Co.*, 6 Cranch, 280, the court made a like order. And another of similar character in *Barnes* v. *Williams*, 11 Wheat., 415. We should thus obtain a verdict in due form, with all the facts found positively, and not the mere evidence of some of them submitted. And the judgment below could then be rendered understandingly, as it could also here, if the case was again brought here by either party.

It does not seem promotive of justice to affirm a judgment below, on the ground that the imperfect verdict must at all events stand, and to decide technically on the hypothesis that a certain transaction is not in the case as a fact, and is not to be considered, nor allowed to be corrected and re-stated, though full evidence of it is submitted. And the more especially does it look wrong, where, if it was corrected in con-

formity with what the evidence proves, the judgment ought, in my view, to be for the plaintiffs.

But it is objected, that the counsel agreed below to waive *this exception to the special verdict, and consequently the court there rendered judgment on that agreement and waiver, as well as on the verdict, and that this was a wrong course of proceeding. [*488

Supposing it was wrong, there is no proof that the court acted on the agreement and waiver, but may have deemed it proper to disregard them and decide on the verdict alone. On the contrary, if that court decided on the whole, their decision for the defendant seems to me erroneous, both on the merits and on the course of proceeding, and ought in either court to be reversed instead of affirmed, as it has been on this occasion by the majority of this court. The original plaintiffs should, on the apparent merits, in my apprehension, recover, because no doubt exists, first, that in point of law the note in controversy must be construed by the laws of Pennsylvania, where it was made; and that by those laws it was negotiable. See act of February 27th, 1797, 4 Dall., Laws of Pennsylvania, 102.

It is as little in doubt, that no pretence exists but that the plaintiffs took this note from the second indorsees before it was due, and without any circumstances to excite suspicion or cast a shade over its goodness, and without any notice or knowledge of the badness of its original consideration.

Under such circumstances it is equally clear, that such a *bonâ fide* holder of a note is presumed to have given a valid consideration for it, and on producing it is entitled to a recovery of its amount, unless this presumption is repelled by counter evidence. Story on Prom. Notes, p. 220.

Furthermore, in such case it is no obstacle to a recovery, that a consideration is not shown between the first indorsee and his indorser. 1 Ad. & Ell., 498.

But it is found here that, for some reason not specified in the record, there was fraud in the original consideration. Hence it is contended that the holder must, in such case, prove a consideration given by him; but he is not otherwise affected by the original fraud, when without notice of it. 4 Ad. & Ell., 470; Chit. on Bills, 69.

Granting this for the argument, it appears that he proceeded to show a consideration, and proved that the second indorsee passed the note to him to secure and pay certain debts and liabilities assumed then in his behalf, as would seem to be inferable from the record. It would in that event be obtained in the course of business for a new and original con-

sideration, and thus the transfer stood unimpeached. But if
*489] the debts were pre-existing ones, as is contended, they would still constitute a *good consideration. However the decisions in different states on this may differ, and may have changed at different periods, this court seems deliberately to have held this doctrine in *Swift* v. *Tyson*, 16 Pet., 15, 22.

It will not answer to overturn all these established principles, because some might fancy the equities of the maker, who was defrauded as to the consideration, greater than those of the present holder, who paid a full and valuable consideration for the note, relying, too, on the good faith of the maker, not to send negotiable paper into the market, and running for five years, so as to mislead innocent purchasers, and, for aught which appears, making no attempt to recall it when discovering he was defrauded, and giving no public and wide caution, as is usual, by advertisement or otherwise, against a purchase of it after such discovery.

Under such circumstances, if equities were to weigh, irrespective of the law, which cannot be correct, they seem rather to preponderate in favor of the holder, who has thus been misled and exposed to be wronged by the conduct of the maker. *United States* v. *Bank of the Metropolis*, 15 Pet., 398.

Finally, were we compelled to give a decision as to the merits on the special verdict, as it now stands somewhat defective in form, but with an agreement by counsel virtually to waive the defect of form, it would be most just to regard the jury as intending to find for a fact what they find as given in evidence and uncontradicted. This is clearly the substance of this verdict, and in such a view, as already shown, the same result would follow, that the plaintiffs appear in law entitled to recover.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs.

*ALEXANDRINE MAGER, WIDOW COLLARD, OPPONENT AND PLAINTIFF IN THE MATTER OF THE SUCCESSION OF JOHN MAGER, DECEASED, PLAINTIFF IN ERROR, *v.* FELIX GRIMA, TESTAMENTARY EXECUTOR OF THE LAST WILL AND TESTAMENT OF JOHN MAGER, DECEASED, AND THE TREASURER OF THE STATE OF LOUISIANA.

By a law of the state of Louisiana, every person not being domiciliated in that state, and not being a citizen of any state or territory in the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, shall pay a tax to the state of ten per cent. of the value thereof.

This law is not repugnant to the Constitution of the United States.[1]

THIS case was brought up, by a writ of error issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of Louisiana.

The Widow Collard, who was the plaintiff in error, resided at Metz in the kingdom of France, and was the universal legatee of her brother, Jean Mager, who died in Louisiana. There was a statement of facts in the court below, which explains the whole case.

"*Statement of Facts agreed.*

"Succession of John Mager, on the opposition of Alexandrine Collard, to the tableau filed by the testamentary executor.

Case agreed.

"1st. The tableau filed by the executor is made part of this case, to show that the executor retains from the opponent, the universal legatee of John Mager, the sum of eight thousand dollars and upwards, being the amount of the tax imposed by the fourth section of the act of the Legislature of the state of Louisiana, passed on the 26th of March, 1842, on property or estates inherited by foreigners within the state of Louisiana, and which is in the words and figures following:—

"'SEC. 4th. Be it further enacted, &c., that each and every person, not being domiciliated in this state, and not being a citizen of any state or territory in the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this state or elsewhere, shall pay a

[1] APPLIED. *Frederickson* v. *Louisiana*, 23 How., 447. DISTINGUISHED. *Dallinger* v. *Rapello*, 14 Fed. Rep., 33. FOLLOWED. *Provost* v. *Greneaux*, 19 How., 7.

tax of ten per cent. on all sums, or on the value of all property, which he may actually receive from said succession, or so much thereof as is situated in this state, after deducting debts due by said successions. When the said inheritance, donation, or legacy consists of specific property, and the same has not
*491] been sold, the appraisement thereof in the inventory shall be considered *as the value thereof. Every executor, curator, tutor, or administrator, having the charge or administration of succession property belonging, in whole or in part, to a person residing out of this state, and not being a citizen of any other state or territory, shall be bound to retain in his hands the amount of the tax imposed by this act, and to pay over the same to the state treasurer, if the succession be opened in the parish of Orleans or Jefferson, or to the sheriff, if the succession be opened in any other parish; in default whereof every such executor, curator, tutor, or administrator, and his securities, shall be liable for the amount thereof. It shall be the special duty of the judges of the Courts of Probate to see that the tax imposed by virtue of this section be collected and paid over; and each of said judges shall be bound to furnish to the treasurer, once a year, a statement or list of the successions opened in his parish, whereof persons who are neither residents of this state, nor citizens of any other state or territory in the Union, are heirs, legatees, or donees, in whole or in part, and of the amount accruing to such persons; and any judge failing to furnish such statement shall be subject to a fine not exceeding five hundred dollars for each and every such omission; and that he be responsible to the state for the amount due; and that the sheriffs of the different parishes throughout the state, except those of the parishes of Orleans and Jefferson, shall pay over the taxes thus received from successions in the same manner, and be subject to the same penalties, as in the payment of other taxes; and that the taxes thus received be taken view in the execution of the sheriff's bond.'

"2d. It is agreed that, by the laws of France, a tax or duty of six and a half per cent. would be levied by the French government on an inheritance falling to an American citizen, in the same degree of relationship to a deceased French subject as the opponent and universal legatee in this case bore to the deceased John Mager, the testator.

"3d. The testator, John Mager, was a natural-born Frenchman, who had emigrated to the United States after the cession of Louisiana to France, and died in the city of New Orleans.

"4th. The opponent, Agathe Alexandrine Mager, Widow Collard, is the sister of the testator, and his universal legatee,

according to his last will and testament, duly recorded in this court, and admitted to probate, and is a French subject residing in France.

"5th. The last will of the testator, John Mager, and all the mortuary proceedings in this court, make part of this case, and may be referred to, and used in whole or in part, by either party.

"If upon this case the law of the state of Louisiana [*492 aforesaid, imposing the tax aforesaid, be valid, and not repugnant to the Constitution of the United States, then the opposition of the opponent to be dismissed, and the tableau homologated and approved. If, on the contrary, the said law imposing said tax is repugnant to the Constitution of the United States, then the opposition shall be maintained, and the item of eight thousand dollars and upwards, as aforesaid, retained as the amount of said tax, shall be expunged, and the same merged in the succession of the said John Mager, to be paid over to his universal legatee.

(Signed,) ISAAC T. PRESTON, *Attorney-General.*
H. R. DENIS, *Attorney for Opponent.*"

The Court of Probate dismissed the opposition of the Widow Collard, and ordered the account of the executor (retaining the tax) to be homologated. An appeal was carried to the Supreme Court of Louisiana, which affirmed the judgment of the Court of Probates, and the case was then brought up to this court under the twenty-fifth section of the Judiciary Act.

It was argued by *Mr. Jones*, for the plaintiff in error, and *Mr. Coxe*, for the defendants in error.

The points upon which *Mr. Jones* rested his argument were the following, which were opposed by *Mr. Coxe*.

I. The tax in question is laid on the person and the rights of an alien residing in his own country;—and so is repugnant to the exclusive power of Congress to regulate commerce with foreign nations.

II. Or it is a tax on the property and effects in the hands of the executor, and under the sole destination of being exported to the foreign legatee; and so is a tax on exports, and expressly prohibited by the Constitution.

I. It is repugnant to the power of Congress to regulate commerce with foreign nations.

Under this head two questions arise,—

First, whether it be in the nature of a regulation of commerce, such as the Constitution contemplated in the grant to Congress of the power to regulate commerce.

Second, whether that power be in its terms or in its nature exclusive, and incompatible with state regulations of commerce.

First. To lay a peculiar tax, out of the rule of taxation common to the citizens of the state, on foreigners residing in their own country and holding property, or having vested *rights and interests of any kind in the state, and to lay it for the reason that they are foreigners beyond the jurisdiction of the state, is to exercise a power comprehended in the terms of the general power to regulate commerce with foreign nations. [*493]

II. The tax in question is essentially a tax on *exports*.

The state of Maryland could lay no tax on imported goods, even after the importation was consummated, and the goods removed to the importer's warehouse for sale, but still unsold. *Brown* v. *Maryland*, 12 Wheat., 419. *A fortiori*, not on effects deposited in the hands of an executor, trustee or agent, to be exported or remitted to the owner abroad.

Shifting the tax from the material of the export to the person of the exporter, does not alter its essence. *Brown* v. *Maryland*, 12 Wheat., 449.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is a plain case, and when the facts are stated, the question of law may be disposed of in a few words.

The plaintiff in error was the residuary legatee—or, in the language of Louisiana law, the universal legatee—of a certain John Mager, who was a native of France, and migrated to the United States after the cession of Louisiana. He died at New Orleans possessed of property to a large amount. The widow Collard is his sister. At the time of his death she was a French subject residing in France.

By the law of Louisiana a tax of ten per cent. is imposed on legacies, when the legatee is neither a citizen of the United States, nor domiciled in that state. And the executor of the deceased, or other person charged with the administration of the estate, is directed to pay the tax to the State Treasurer.

Felix Grima, the defendant in error, is the executor of John Mager, and retained the amount of the tax, in order to pay it over as the law directs. And this suit was brought by the legatee to recover it, upon the ground that the act of the Louisiana Legislature is repugnant to the Constitution of the United States.

Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or

personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or *legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the states of this Union at this day, real property devised to an alien is liable to escheat. And if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of ten per cent. for the use of the state. [*494

In some of the states, laws have been passed at different times imposing a tax similar to the one now in question, upon its own citizens as well as foreigners; and the constitutionality of these laws has never been questioned. And if a state may impose it upon its own citizens, it will hardly be contended that aliens are entitled to exemption; and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens.

We can see no objection to such a tax, whether imposed on citizens and aliens alike, or upon the latter exclusively. It certainly has no concern with commerce, or with imports or exports. It has been suggested, indeed, in the argument, that, as the legatee resided abroad, it would be necessary to transmit to her the proceeds of the portion of the estate to which she was entitled, and that the law was therefore a tax on exports. But if that argument was sound, no property would be liable to be taxed in a state, when the owner intended to convert it into money and send it abroad.

The judgment of the state court was clearly right, and must be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the state of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed with costs.

*CHARLES A. WILLIAMSON AND CATHARINE, HIS WIFE, PLAINTIFFS, v. JOSEPH BERRY.

Mary Clarke devised to Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and their heirs forever, as joint tenants, and not as tenants in common, "all that part of my said farm at Greenwich aforesaid, called Chelsea, &c., to have and to hold the said hereby devised premises to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and to the heirs of such survivor, as joint tenants, and not as tenants in common, in trust, to receive the rents, issues, and profits thereof, and to pay the same to Thomas B. Clarke, &c., during his natural life, and from and after the death of Thomas B. Clarke, in further trust, to convey the same in fee to the lawful issue of the said Thomas B. Clarke, living at his death." Under this devise, the first-born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let in his other children to the like estate, as they were successively born, and such vested remainder became a fee simple absolute in the children living, on the death of their father.[1]

The acts of the legislature of New York passed for the relief of Thomas B. Clarke show that he was made the trustee of the property devised, to sell or mortgage a part of it, with the assent or appointment of the Chancellor. His obligation was to account annually for the proceeds of every sale or mortgage which might be made, and it was his right to use the interest of the principal for himself and for the education and maintenance of his children.

The acts of the legislature discharged the trustees named in the devise, whatever may have been their estate in the land under it, but did not vest an estate in fee in Thomas B. Clarke.

The acts of the legislature for the relief of Clarke are private acts. They provide that the Chancellor may act upon them summarily, upon the petition of Clarke, upon which orders are given, as contradistinguished from decrees in suits by bill filed. The last are judgments upon the matters in controversy between the parties before the court. The other are orders in conformity with a legislative act in a particular case. Whatever the Chancellor does in either case, he does as a court of chancery. It will stand when it has been done within the jurisdiction conferred by the private act, until it has been set aside upon motion, as his decrees in suits upon bill filed do, until they have been set aside by a bill of review.

In such a case the court will not deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction, and partly upon the statute. It cannot confound its original jurisdiction in a suit with the powers it may be authorized to execute by petition, either in a public act giving statutory jurisdiction to the court, to be exercised summarily upon petition, or in a private act providing for relief in a particular case, which is to be carried out by the same mode of procedure.

In these acts for the relief of Clarke, what the Chancellor can do is precisely stated. No authority was given to him, in giving his assent to Clarke's making sales of any part of the devised premises, to order that Clarke might make sales of any portion of it, in payment and satisfaction of any debt or debts due and owing by Clarke, upon a valuation to be agreed upon, between him and his respective creditors. Or that Clarke might take the money arising from the sales of the premises, and apply the same to the payment of his debts, investing the surplus only in such manner as he may deem proper to yield an income for the maintenance and support of his family. This was not an exercise of jurisdiction, but an order out of and beyond it.[2]

These were private acts for the alienation of land, to be made with the assent

[1] CITED. *Doe, Lessee of Poor*, v. *Considene*, 6 Wall., 478.

[2] See *Warner* v. *Martin*, 11 How., 220.

of the Chancellor that there might be an assurance by matter of record, under his sanction, of a transfer of the property to such as might become purchasers from Clarke.

Neither orders summarily given upon petition in chancery, nor decrees in suits upon bill filed, can be summarily reviewed as a whole in a collateral way.

But it is a well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when *the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings.[3] [*496

The rule applies to the case in hand, though it may have been decided by the highest tribunal in New York, that the Chancellor had jurisdiction, under the acts for the relief of Clarke, to give the order permitting him to sell the property to his creditors, in payment of his debts, for though this court will recognize as a rule for its judgments the decisions of the highest courts of the states relative to real property as a part of the local law, it does not recognize as in any way binding upon them, as a part of the local law, the decisions of the state courts upon private acts of any kind, or such of them as provide for the alienation of private estates, by particular persons, with the sanction of a court or of the Chancellor. Decisions upon private acts form no part of the local law of real property. They concern only those for whose benefit they are made, and can be no rule for any other case.

This court decides that, under the acts of New York, the Chancellor had no the jurisdiction to give an order, permitting Clarke to convey any part of the devised premises in satisfaction of his debts, and that neither De Grasse, nor his alienee Berry, can derive from the order of the Chancellor, or from the conveyance by Clarke to De Grasse, any title to the premises in dispute.[4]

Sale is a word of precise legal import, both at law and in equity. It means a contract between parties to take and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold.[5]

A sale ordered, decreed, or permitted by a chancellor, subject to the approval of a master, requires the master's approval, and confirmation by the court,

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[3] CITED. *Thompson* v. *Whitman*, 18 Wall., 467; *Kilbourn* v. *Thompson*, 13 Otto, 198; s. c., 2 MORR. Tr., 80; *Mock* v. *Virginia Fire & Marine Ins. Co.*, 10 Fed. Rep., 706; s. c., 4 Hughes, 119.

The law is now settled, not only by the decisions of the Supreme Court of the United States, but by those of other courts, that the judgments of a court "are open to inquiry as to the jurisdiction of the court and notice to the defendant." *Christmas* v. *Russell*, 5 Wall., 305; *Thompson* v. *Whitman*, 18 Id., 457; s. c., 1 Cent. L. J., 308; *McElmoyle* v. *Cohen*, 13 Pet., 312; *Knowles* v. *Gas Light & Coke Co.*, 19 Wall., 58; *D'Arcy* v. *Ketchum*, 11 How., 165; *Webster* v. *Reed*, Id., 437; *Harris* v. *Hardemann*, 14 Id., 334; *Borden* v. *Fitch*, 15 Johns. (N. Y.), 141; s. c., 8 Am. Dec., 225; *Starbuck* v. *Murray*, 5 Wend. (N. Y.), 156; s. c., 21 Am. Dec., 172. See also, *Moulin* v. *Insurance Co.*, 4 Zab. (N. J.), 222; s. c., 1 Dutch. 57; *Price* v. *Ward*, 1 Dutch. (N. J.), 225; *Mackay* v. *Gordon*, 5 Vr. (N. J.), 286; *Lowe* v. *Lowe*, 40 Iowa, 220; *Webster* v. *Hunter*, 50 Id., 215.

In *Kingsbury* v. *Yniestra*, 59 Ala., 320, it is said that "a defendant sued here upon a judgment recovered against him in a court of record of another state, in which it is recited that he was served with process, or appeared by attorney, may controvert such recital and show that he was not served with process, was not in any manner brought into court, had not submitted himself to its jurisdiction, or appeared therein by attorney or otherwise." See *People* v. *Darnell*, 25 Mich., 247; s. c., 12 Am. Rep., 260; *Bowles* v. *Houston*, 30 Gratt., (Va.) 266; s. c., 32 Am. Rep., 673.

[4] DISTINGUISHED. *Farmers' Loan & Trust Co.* v. *McKinney*, 6 McLean, 8. CITED. *Talcott* v. *Township of Pine Grove*, 1 Flipp., 124.

[5] QUOTED. *Coombs* v. *Steere*, 8 Bradw. (Ill.), 150.

[illegible][6]

This case came up from the Circuit Court of the United States for the Southern District of New York on a certificate of division in opinion between the judges thereof.

It was an action of ejectment for one third of eight lots of land in the city of New York. Mrs. Williamson was the daughter of Thomas B. Clarke, being one of three children who survived him, the other two being Mrs. Isabella M. Cochran and Bayard Clarke.

In the year 1802 Mary Clarke died, leaving a will, from which the following is an extract:—

"Item. I give and devise unto the said Benjamin Moore and Charity, his wife, and to Elizabeth Maunsell, and their heirs forever, as joint tenants, and not as tenants in common, all that certain lot of land number eight in the said thirteenth
*497] allotment of the said patent, containing one hundred acres; also that part of *my said farm at Greenwich aforesaid, called Chelsea, lying to the northward of the line herein before directed to be drawn from the Greenwich road to the Hudson River, twelve feet to the northward of the fence standing behind the house now occupied by John Hall, bounded southerly by the said line, northerly by the land of Cornelius Ray, easterly by the Greenwich road, and westerly by the Hudson, including that part of my said farm now under lease to Robert Lenox; also all my house and lot, with the appurtenances, known by number seven, within the limits of the prison, and now occupied by Thomas Byron; to have and to hold the said hereby devised premises to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and the heirs of such survivor, as joint tenants, and not as tenants in common, in trust

6 See *Suydam* v. *Williamson*, 20 How., 431; *Same* v. *Same*, 24 Id., 431; *Same* v. *Same*, 6 Wall., 729.

to receive the rents, issues, and profits thereof, and to pay the same to the said Thomas B. Clarke, natural son of my late son Clement, during his natural life, and from and after the death of the said Thomas B. Clarke, in further trust to convey the same to the lawful issue of the said Thomas B. Clarke living at his death in fee; and if the said Thomas B. Clarke shall not leave any lawful issue at the time of his death, then in the further trust and confidence to convey the said hereby devised premises to my said grandson Clement C. Moore, and to his heirs, or to such person in fee as he may by will appoint, in case of his death prior to the death of the said Thomas B. Clarke."

On the 2d of March, 1814, Thomas B. Clarke presented a petition to the legislature of New York, stating the will; that the trustees had signed a paper agreeing to all such acts as the legislature might pass, and requesting to be discharged from the trust; that Clement C. Moore, the devisee in remainder, had also consented to such acts; and that the estate could not be so improved and made productive as to answer the benevolent purposes of the testatrix. The prayer was for general relief.

On the 1st of April, 1814, the legislature passed an act, entitled, "An act for the relief of Thomas B. Clarke." It recited the facts above mentioned, and then provided, in the first section, "that it shall and may be lawful for the Court of Chancery, on the application of the said Thomas B. Clarke, to constitute and appoint one or more trustees to execute and perform the several trusts and duties specified and set forth in the said in part recited will and testament, and in this act, in the place and stead of the said Benjamin Moore and Charity, his wife, and the said Elizabeth Maunsell, who are hereby discharged from the trusts in the said will mentioned. Provided, that it *shall be lawful for the said court at [*498 any time thereafter, as occasion may require, to substitute and appoint other trustee or trustees in the room of any of those appointed in this act, in like manner as is practised in the said court in cases of trustees appointed therein; and such trustee or trustees so appointed, are hereby vested with the like powers as if he or they had been named and appointed in and by this act."

The second, third, fourth, and fifth sections prescribed minutely what should be done by the trustees, and authorized them to sell and dispose of a moiety of the estate, and invest the proceeds in some productive stock, the interest, excepting a certain portion, to be paid to Mr. Clarke, and the principal to be reserved for the trusts of the will.

The sixth section was as follows:—

"VI. And be it further enacted, that in every case, not otherwise provided for by this act, the trustees appointed, or to be appointed, in virtue thereof, shall be deemed and adjudged trustees under the said will, so far as relates to the premises mentioned and described in the recital to this act, in like manner as if such trustees had been originally named and appointed in the said will; and they shall, in all respects, be liable to the power and authority of the Court of Chancery for or concerning the trusts created by this act."

It did not appear that any proceedings took place under this act.

On the 1st of March, 1815, Clarke presented another petition to the Legislature, stating that Clement C. Moore, the contingent devisee, had released all his interest in the property to Clarke and his family, whereby the petitioner and his infant children had become the only persons interested in the estate. He stated also, that he had been unable to prevail upon any suitable person to undertake the performance of the trust.

On the 24th of March, 1815, the legislature passed an act supplemental to the "Act for the relief of Thomas B. Clarke." This act being a very important part of the case, it is proper to recite it.

"An Act supplemental to the 'Act for the Relief of Thomas B. Clarke,' passed April 1, 1814.

"Whereas, since the passing of the act entitled 'An act for the relief of Thomas B. Clarke,' Clement C. Moore, in the said act named, by an indenture duly executed by him, and recorded in the office of the Secretary of this state, and bearing date the 21st day of February, in the year 1815, hath, for *499] the consideration therein expressed, and in due form of law, released and *conveyed unto the said Thomas B. Clarke, his heirs and assigns, forever, all the estate, right, title, interest, property, claim, and demand whatsoever, of the said Clement C. Moore, of, in, and to the real estate mentioned in the said act, whereby the said real estate became exclusively vested in the said Thomas B. Clarke and his children. And whereas the said Thomas B. Clarke hath prayed the Legislature to alter and amend the said act, particularly in relation to the interest of the said Clement C. Moore, and the execution of certain trusts in the said act mentioned, therefore,—

"I. Be it enacted by the people of the state of New York, represented in Senate and Assembly, that all the beneficial

interests and estate of the said Clement C. Moore, or those under him, arising or to arise by virtue of the act to which this is a supplement, or by the will mentioned in the said act, shall be, and the same is hereby, vested in the said Thomas B. Clarke, his heirs and assigns; and so much of the act to which this is a supplement as is repugnant hereto, and so much thereof as requires the trustees to set apart and reserve a certain annual stipend out of the interest or income of the property thereby directed to be sold, for the purpose of creating and accumulating a fund at compound interest, during the life of the said Thomas B. Clarke; and so much of the said act as requires the several duties therein enumerated to be performed by trustees, to be appointed by the Court of Chancery, as therein mentioned, be, and the same is hereby, repealed.

"II. And be it further enacted, that the said Thomas B. Clarke be, and is hereby, authorized and empowered to execute and perform every act, matter, and thing, in relation to the real estate mentioned in the act to which this is a supplement, in like manner and with like effect that trustees duly appointed under the said act might have done, and that the said Thomas B. Clarke apply the whole of the interest and income of the said property to the maintenance and support of his family, and the education of his children.

"III. And be it further enacted, that no sale of any part of the said estate shall be made by the said Thomas B. Clarke, until he shall have procured the assent of the Chancellor of this state to such sale, who shall, at the time of giving such assent, also direct the mode in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in the said Thomas B. Clarke as trustee; and, further, that it shall be the duty of the said Thomas B. Clarke annually to render an account to the Chancellor, or to such person as he may appoint, of the principal of the proceeds of such sale only, the interest *being to be [*500 applied by the said Thomas B. Clarke, in such manner as he may think proper, for his use and benefit, and for the maintenance and education of his children; and if, on such return, or at any other time, and in any other manner, the Chancellor shall be of opinion that the said Thomas B. Clarke hath not duly performed the trust by this act reposed in him, he may remove the said Thomas B. Clarke from his said trust, and appoint another in his stead, subject to such rules as he may prescribe in the management of the estate hereby vested in the said Thomas B. Clarke as trustee."

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

On the 3d of July, 1813, the Chancellor issued an order, reciting the circumstances of the case, and according thereto:—

"Therefore, on motion of Mr. S. Jones, junior, of counsel for the petitioner, it is ordered that the assent of the Chancellor be, and hereby is given to the sale, by the petitioner, of the said house and lot in the fifth ward of the city of New York, and of the eastern moiety or half part of the said premises at Greenwich, in the ninth ward of the city of New York, to be divided by the line in the manner for that pur-

*601] pose mentioned in the said petition; and the petitioner is authorized and directed *to sell and dispose of the same, under and according to the aforesaid acts of the Legislature in that behalf, the said sales to be made under the direction of one of the masters of this court, and the petitioner to proceed in making the sales and conveyances of the said premises, so to be sold, in the manner for that purpose in and by the said acts prescribed and directed. And it is further ordered, that the purchase-moneys for the said premises so to be sold be paid by the purchasers to the said master, to be disposed of by him as hereinafter directed. And it is fur-

ther ordered and directed, and his Honor the Chancellor hereby doth authorize, order, and direct, that so much of the net proceeds, to arise from such sales, as may be necessary for the purpose, be applied, under the direction of one of the masters of this court, in and for the payment and discharge of the debts now owing by the petitioner, and to be contracted for the necessary purposes of his family, to be proved before the said master; and the costs, charges, and expenses of the petitioner, on his petition in this matter, and the proceedings had, and to be hereafter had, under or in consequence thereof; but so, however, and it is further ordered and directed, that the net proceeds of the said eastern moiety of the said premises at Greenwich aforesaid, or so much thereof as shall be necessary for that purpose, be applied in the first place, and before and in preference to any other appropriation or application thereof, to pay and satisfy to the President and Directors of the Manhattan Company aforesaid the aforesaid debt or sum of four thousand four hundred dollars, with the interest thereof up to the time of such payment, or such part and balance of the said debt, and interest, as shall not have been otherwise paid or satisfied. And it is further ordered and directed, and his Honor the Chancellor hereby doth further order and direct, that the residue of the said net moneys, and proceeds arising from such said sales, after the said debts, costs, charges, and expenses shall be discharged and paid by and out of the same, be placed out at interest, on real security, in the city of New York, in the name of the petitioner as trustee, under the direction of one of the masters of this court, upon the following trusts, to be expressed upon the face and in the body of the said securities respectively, whereon the same shall be so placed, that is to say, upon trust that the interest and income thereof, or so much of the same as may be required for that purpose, be applied, from time to time, in and for the suitable and proper maintenance and support of the petitioner, and his wife and children, already born and to be hereafter born, according to their situation in life, and for the suitable education *of the said children; [*502 and upon further trust, that the principal sum or sums, with the securities whereon the same may be vested or placed, and may stand, shall be held, and he, the petitioner, as trustee, stand and be possessed thereof in trust, for the benefit of the lawful issue of the petitioner who shall be living at the death of him, the petitioner, according to the trusts upon which the unsold moiety of the said premises at Greenwich aforesaid, in the aforesaid acts of the Legislature mentioned, are or shall be held; and so, and in such manner, that the said interest

and income of the said trust moneys, funds, and securities, or so much thereof as may be requisite thereto, shall be appropriated, applied, and secured in the first instance, and exclusively, to the suitable maintenance of the family of the petitioner, according to their situation in life, and the suitable education of his children, and shall not be subject or liable to or for the engagements, debts, or control of the petitioner, or for any other purpose whatsoever than the said purposes hereby designated and authorized; provided that any surplus of the said interest and income, that may be left and remain after the said objects and purposes, hereby designated as aforesaid, are first fully and liberally fulfilled and accomplished, according to the true meaning hereof, shall be for the use and at the disposal of him, the petitioner. And it is further ordered that the master, under whose direction the said sales should be made, and the debts paid, and surplus proceeds placed out as aforesaid, report to this court the proceedings that may be had in the premises, and the securities that may be taken therein, pursuant to this order, with all convenient speed; and that all and every person or persons who are, or is, or may become interested therein, have liberty to apply to this court, at any time or times hereafter, for any further or other orders or directions in or touching the premises."

On the 12th of March, 1816, Clarke again applied to the legislature. The petition is short, and may be inserted.

"To the Honorable the Legislature of the state of New York.

The memorial and petition of Thomas B. Clarke, of the city of New York, respectfully showeth:—

"That his Honor, the Chancellor, under the act 'for the relief of Thomas B. Clarke,' passed April 1, 1814, and the act 'supplemental to the act for the relief of Thomas B. Clarke,' passed March 24, 1815, did order and direct that the said Thomas B. Clarke should sell the eastern moiety or half part of the premises in the said act and order mentioned.

*503] "And your petitioner further shows, that, owing to the scarcity *of money, and the present low price of property, no sale can be made without a great sacrifice.

"Your petitioner therefore prays, that he may be allowed to mortgage such part of the property, in the said act mentioned, as the Chancellor may appoint, and for the purposes mentioned in the said acts and order; and that your petitioner be allowed to bring in a bill for that purpose. And he will ever pray, &c."

On the 29th of March, 1816, the legislature passed the following act:—

"An Act further supplemental to an Act entitled 'An Act for the relief of Thomas B. Clarke.'

"Be it enacted by the people of the state of New York, represented in Senate and Assembly, that the said Thomas B. Clarke be, and he is hereby, authorized, under the order heretofore granted by the Chancellor, or under any subsequent order, either to mortgage or to sell the premises which the Chancellor has permitted, or hereafter may permit, him to sell, as trustee under the will of Mary Clarke, and to apply the money so raised by mortgage or sale to the purposes required, or to be required, by the Chancellor, under the acts heretofore passed for the relief of the said Thomas B. Clarke."

On the 27th of May, 1816, Clarke presented another petition to the Chancellor, again reciting all the facts in the case, and praying his assent to a mortgage.

On the 30th of May, 1816, the Chancellor passed the following order:—

"It is ordered, that the said petitioner, under the act entitled 'An act further supplemental to the act entitled "An act for the relief of Thomas B. Clarke,"' passed March 29th, 1816, be, and he is hereby, authorized, so far as the assent of this court is requisite, to mortgage, instead of selling, the lands he was authorized to sell, in and by an order of this court of the third day of July last; and that the moneys to be procured, and the debts to be extinguished by such mortgage or mortgages, be appropriated and adjusted in the same manner and under the same checks, and not otherwise than is prayed for in and by said order, and the said order is to apply to and govern the application of the moneys to be raised by mortgage, equally as if the same had been raised by a sale of all or any of the lands authorized to be sold in and by the said order.

"*May 30th*, 1816. J. KENT."

On the 8th of March, 1817, Clarke presented another petition *to the Chancellor, representing the propriety [*504 and expediency of dividing the estate by an eastern and western, instead of a northern and southern line, and of granting to the petitioner the power to sell or mortgage the southern, instead of the eastern moiety. This being referred to James A. Hamilton, a master in chancery, he reported that it would be expedient to divide the estate by a line running from east to west, passing through Twenty-sixth street.

On the 15th of March, 1817, the Chancellor passed the following order:—

"On reading and filing the report of James A. Hamilton, esquire, one of the masters of this court, bearing date the 11th day of March, 1817, by which it appears that no part of the northern moiety of the estate at Greenwich, mentioned in the petition of the above-named petitioner, the same being divided into two equal parts by a line running from east to west, through a street called Twenty-sixth street, has been either sold or mortgaged by the said Thomas B. Clarke, and it appearing to this court reasonable and proper that the prayer of the said petitioner should be granted, it is thereupon ordered, on motion of Mr. S. Jones, solicitor for the petitioner, that the said petitioner be, and he is hereby, authorized to sell and dispose of the southern moiety of the said estate, the same being divided by a line running east and west through the center of Twenty-sixth street aforesaid, together with the lot in Broadway, instead of the eastern moiety of the said estate, as permitted and directed by the orders heretofore made in the premises. And it is further ordered, that the said Thomas B. Clarke be, and he hereby is, authorized to mortgage all or any tract or parts of the said southern moiety of the said estate, if in his judgment it will be more beneficial to mortgage them than to sell the same. And the said Thomas B. Clarke is further authorized to convey any part or parts of the said southern moiety of the said estate, in payment and satisfaction of any debt or debts due and owing from the said Thomas B. Clarke, upon a valuation to be agreed on between him and his respective creditors; provided, nevertheless, that every sale, and mortgage, and conveyance in satisfaction, that may be made by the said Thomas B. Clarke in virtue hereof, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises. And it is further ordered, that the said Thomas B. Clarke shall be, and he is hereby, authorized to receive and take the moneys
*505] arising from the premises, and apply the same to the payment of his debts, and invest the surplus *in such manner as he may deem proper to yield an income for the maintenance and support of his family."

On the 9th of April, 1816, Clarke mortgaged the premises in question, with other property, being in the southern moiety of the estate, to Henry Simmons, which mortgage was discharged in 1822.

Having given this historical account of the facts of the case, let us now see what occurred upon the trial in the court below.

It has already been mentioned, that it was an ejectment

brought by Williamson and wife against a party in possession of a portion of the property included in the devise of Mary Clarke. The following case was stated for the opinion of the court:

Circuit Court, U. S., Southern District New York.

CHARLES A. WILLIAMSON AND CATHARINE H., HIS WIFE, *v.* JOSEPH BERRY.

This is an action of ejectment for the undivided third part of eight lots of land, in the sixteenth ward of the city of New York.

The pleadings may be referred to as part of this case.

The plaintiffs claimed under the will of Mary Clarke.

The plaintiffs gave in evidence an exemplified copy of the will of Mary Clarke, proved in the Supreme Court, of which a copy is hereto annexed.

It was then admitted by the defendant's counsel, that Mary Clarke was seized of the premises described in the said will as "all that part of my said farm at Greenwich aforesaid, called Chelsea, lying to the northward of the line herein before directed to be drawn from the Greenwich road to the Hudson River, twelve feet to the northward of the fence standing behind the house now occupied by John Hall; bounded southerly by the said line, northerly by the land of Cornelius Ray, easterly by the Greenwich road, and westerly by the Hudson, including that part of my said farm now under lease to Robert Lenox." At the time of the making of the will, and thence until her death, which took place in July, 1802, that the said premises included the eight lots claimed herein; that the said trustees, Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, are all dead,—Mrs. Moore having died since 1830, the other two previously; that Thomas B. Clarke was married in 1803; that his wife died in August, 1815, and himself on the 1st of May, 1826; that he left three children surviving him, Catharine, Isabella, and Bayard; that he had four other children, all of whom died before him, without having had any *children, and unmarried; that Catharine was born on the 5th of June, 1807, and was married to Charles A. Williamson, on the 10th of May, 1827; that Isabella was born on the 11th day of June, 1809, and was married to Rupert J. Cochran on the 4th day of June, 1835; that Bayard was born on the 17th day of March, 1815; all of whom are still living. It was also admitted that the defendant was the actual occupant of the premises at the commencement of this suit, on the 6th of March, 1845; and that [*506

one third of the premises claimed was of greater value than two thousand dollars.

The plaintiffs thereupon rested.

The defendant's counsel then proved the acts of the Legislature, the deed of Clement C. Moore, the petitions to the Chancellor, the master's reports, and the orders of the Chancellor, (excepting only the order indorsed on petition,) of which copies are hereto annexed.

The defendant's counsel then offered in evidence the deed from Thomas B. Clarke to George De Grasse, of which the following is a copy:—

"This indenture, made this 2d day of August, in the year of our Lord 1821, between Thomas B. Clarke, of the city of New York, gentleman, of the first part, and George De Grasse of the second part. Whereas the said Thomas B. Clarke, by virtue of sundry conveyances, acts of the Legislature, and orders of the Court of Chancery of the state of New York, hath been empowered to sell, or mortgage, or convey, in satisfaction of any debt due from him to any person or persons, the southern moiety of the estate at Greenwich, devised by Mary Clarke, deceased, for the benefit of the said Thomas B. Clarke and his children, or any part thereof. Now, therefore, this indenture witnesseth, that the said Thomas B. Clarke, in consideration of the premises, and of two thousand dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, convey, and confirm unto the said party of the second part, his heirs and assigns, for ever, all those lots of ground situate, lying, and being in the Ninth ward of the city of New York, known and distinguished on a certain map of the property of the said Thomas B. Clarke," &c.

(The deed then described twenty-nine lots, with a covenant of general warranty.)

James A. Hamilton joined in this deed, as a trustee for Clarke's life estate, of which he had become possessed.

*507] This deed was objected to by the plaintiffs' counsel, for two reasons:—

1. Because not approved by a master.

2. Because not shown to have been given upon a sale for cash.

The objections were overruled, and the plaintiffs' counsel excepted.

The deed was then read in evidence, as was also a deed

from George De Grasse to Margaret Van Surlay. (It is not necessary to insert this deed.)

The defendant's counsel then rested.

The plaintiffs' counsel then offered to read the petitions to the Legislature, the extracts from the journals of the two houses, and the order indorsed on petition, of which copies are hereto annexed. They were objected to by the defendant's counsel, the objection sustained, and the plaintiffs' counsel excepted.

The plaintiffs' counsel then proved the mortgage executed by Thomas B. Clarke to Henry Simmons, of which the following is a copy. (It is not necessary to insert this mortgage.)

The plaintiffs' counsel then offered evidence to show the consideration of the deed from Clarke to De Grasse. The defendant's counsel objected; the objection was overruled, and the defendant's counsel excepted.

The plaintiffs' counsel then called as a witness James A. Hamilton, who testified that he knew Thomas B. Clarke and George De Grasse; that in 1821, and for some years previous, he was a master in chancery in the city of New York; that the order of March 15, 1817, was put into his hands for execution, and that Clarke and De Grasse applied to him to approve the deed from Clarke to De Grasse above set forth; that on that occasion, which was at or about the time the deed was given, they explained to him the consideration of the deed, and that the consideration for which it was given was some wild lands in Pennsylvania or Virginia, and an account for articles previously furnished to Clarke by De Grasse, out of any oyster-house which he kept, including some items of money let. On thus ascertaining its consideration, he refused to approve the deed.

On his cross-examination, he said that he could not state the time at which the transaction occurred, except by reference to the deed; he had more than one interview with Clarke and De Grasse, he was sought by them more than once; he did not consider the execution of the life-estate deed a matter of any interest; he executed it as trustee. He did not remember at all a person by the name of James Cunningham; and on being *shown the signature of James Cunningham, as subscribing witness to the deed for the life [*508 estate, witness said that his recollection of the person was not thereby revived. He received from De Grasse no fee. It was his impression, that the account for articles furnished at the oyster-shop was exhibited. He held the life estate of Clarke in the premises as trustee for Clarke. His impression was that Clarke filled up his own deed to De Grasse, and to

obtain his sanction called upon witness; he was not certain that De Grasse was present upon that occasion. He did not recollect that De Grasse was present when the deed for life estate was executed, but he recollected that both Clarke and De Grasse came together to witness's office more than once on the subject, and he was besought by them frequently to approve the deed. In answer to a question by defendant's counsel what evidence he had of the insufficient value of the lands which formed part of the consideration, the witness stated that he had evidence enough then, though he did not recollect it now, that the lands were worthless tax lands. There might have been some money charged in De Grasse's account against Clarke; the whole account was for articles furnished previously. He did not recollect that there were any notes forming part of the consideration of the deed from Clarke.

The plaintiffs' counsel then proved that seven of the lots in suit, viz., numbers 5, 6, 7, 41, 42, 43, and 45, were reconveyed to De Grasse on the 31st of October, 1844.

The defendant's counsel then proved that lot number 44 had been conveyed to Samuel Judd.

They also proved the bond of Clarke to Simmons, referred to in the aforesaid mortgage to Simmons, and called Henry M. Western, who, being shown two indorsements on the said bond, as follows:—

"Received, New York, October 18th, 1821, from Mr. George De Grasse, one hundred dollars on account of the within bond.
$100. H. SIMMONS."

"Received of George De Grasse two hundred and fifty dollars, being in full for principal and interest, and all other claims and demands on account of the within bond, and also of the mortgage therein mentioned, for which mortgage I have this day entered satisfaction of record.

H. SIMMONS.

"*New York, March 28th*, 1822.
"Witness—
H. M. WESTERN."

*509] *testified that he was a subscribing witness to the last, which he wrote; but that he recollected nothing of the transaction but from the paper.

The plaintiffs' counsel then offered to prove,—

(1.) That the acts of the Legislature were not for the benefit of the infants, but for the benefit of Thomas B. Clarke merely.

(2.) That the orders of the Chancellor had the effect to take the proceeds of their future interest in the property, and to apply the same to the father's debts, without giving them any benefit, by support or otherwise, out of the income of the life estate in other parts of the property.

(3.) That, under the acts and orders, he actually aliened the lot on Broadway, and all of the southern moiety of the Greenwich property, excepting two lots, and that none of the children received any benefit from such alienation.

(4.) That the whole of this property was mortgaged or conveyed for old debts; that no proceeds were ever invested, or secured, or even received from the grantees or mortgagees.

(5.) That, so far from providing for the children, or protecting the estate, he suffered a large portion of the northern moiety to be sold for assessments, and was proceeding to dispose of the northern moiety for twenty-one years, when, on the 31st of March, 1826, a bill was filed against him on behalf of the children, and an injunction issued.

(6.) That the plaintiff, Mrs. Williamson, was, from the death of her mother in August, 1815, supported entirely by one of her aunts; and that after about two years from the mother's death, the other children were supported by their friends, and were entirely neglected by their father; and that this was notorious in the city of New York, and would have been immediately known to any one making inquiry.

The defendant's counsel objected; the objection was sustained, and the plaintiffs' counsel excepted.

A verdict was then taken for the plaintiffs for one undivided third part of the eight lots, subject to the opinion of the court upon the questions of law, with power to enter a verdict for defendant, if such should be the opinion of the court, and with liberty to either party to turn this case into a special verdict or bill of exceptions.

On the 18th of May, 1846, the judges of the Circuit Court pronounced their judgment upon the four following points, viz.:—

1. Under the will of Mary Clarke, the first-born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let in his other children to the like estate as they were successively born.

*2. This estate would have become a fee simple absolute in the children living on the death of T. B. Clarke, the first day of May, 1826; and it is not important now to decide whether the trustees took a fee, under the will, in trust to convey to the children after his decease, or a fee for his life, as in the latter case the estate would vest in pos- [*510

session in the children at the death of T. B. Clarke, and in the former case the law would presume an execution of this trust by the surviving trustee at the death of T. B. Clarke, or the trust would be executed in 1839, by force of the Revised Statutes.

3. The several offers of the plaintiffs to give parol evidence to the jury touching the objects and operation of the acts of the Legislature, referred to in the case, or the effect of the orders of the Chancellor therein stated upon the interests of the children of T. B. Clarke, or the failure of T. B. Clarke to apply or secure the proceeds of the devised estate, when disposed of by him, to and for the benefit of his children, or the consideration on which the devised estate was disposed of by T. B. Clarke, or his neglect to protect the estate from sacrifice for assessments, &c., or to provide for and support his children, were properly overruled by the court, with the exception of such particulars included in these offers as may be embraced in the points hereafter stated, upon which the judges are divided in opinion.

4. The acts of the Legislature of the state of New York, of April 1, 1814, March 24, 1815, and March 29, 1816, referred to in the case, are constitutional and valid.

But the judges are divided in opinion upon the following points presented by the case:—

1. Whether the acts of the Legislature, stated in the case, devested the estate of the trustees under the will of Mary Clarke, and vested the whole estate in fee in Thomas B. Clarke.

2. Whether the authority given by the said acts to the trustee to sell was a special power, to be strictly pursued, or whether he was vested with the absolute power of alienation, subject only to re-examination and account in equity.

3. Whether the orders set forth in the case, made by the Chancellor, were authorized by and in conformity to the said acts of the Legislature, and are to be regarded as the acts of the Court of Chancery, empowered to proceed as such in that behalf, or the doings of an officer acting under a special authority.

4. Whether the Chancellor had competent authority, under the acts, to order or allow such sale or conveyance of the estate *by the trustee, as is stated in the case, or any other consideration than for cash, paid on said conveyance. *511]

5. Whether the deed executed by Thomas B. Clarke to George de Grasse, for the premises in question, being upon a consideration other than for cash paid on the purchase, is valid

6. Whether the said deed is valid, it having no certificate indorsed thereon that it was approved by a master in chancery.

7. Whether Thomas B. Clarke, having previously mortgaged the premises in fee to Henry Simmons, had competent authority to sell and convey the same to De Grasse.

8. Whether the subsequent conveyance of the premises as set forth in the case, made by George De Grasse, rendered the title of such grantee, or his assigns, valid against the plaintiffs.

It is thereupon, on motion of the plaintiffs, by their counsel, ordered that a certificate of division of opinion, upon the foregoing points, which are here stated during this same term, under the direction of the said judges, be duly certified, under the seal of this court, to the Supreme Court of the United States, to be finally decided.

Upon this certificate, the case came up to this court. It was argued, in conjunction with the next two cases which will be reported in this volume, by *Mr. Field* and *Mr. Webster*, for the plaintiffs, and *Mr. Jay* and *Mr. Wood*, for the defendants. *Mr. Flanagan* also filed a brief for the defendants.

Each one of the counsel pursued his own train of argument, and filed a separate brief. The statement of these points will make the report of this case unusually long, but the importance of the principles discussed makes it necessary to place before the reader the view which each counsel took in the case. They will be stated in the following order:—*Mr. Field* for the plaintiffs, *Mr. Jay* and *Mr. Wood*, for the defendant, and *Mr. Webster* for the plaintiffs, in reply and conclusion.

Mr. Field. The plaintiffs maintain,—

1. That the acts of the Legislature stated in the case, whether they devested the estate of the trustees under the will of Mary Clarke or not, did not vest the whole estate in fee in Thomas B. Clarke.

2. That the authority given by the said acts to the trustee to sell, was a special power, to be strictly pursued.

3. That the orders set forth in the case were not authorized by, and in conformity to, the said acts of the Legislature, and are to be regarded, not as the acts of the Court of Chancery, empowered to proceed as such in that behalf, but as the doings of an officer acting under a special authority.

*4. That the Chancellor had no competent authority, under the acts, to order or allow such sale or conveyance of the estate by the trustee, as is stated in the case, on any other consideration than for cash paid on such conveyance. [*512

5. That the deed executed by Thomas B. Clarke to George

De Grasse for the premises in question, being upon a consideration other than the sum paid in the purchase, is not valid.

4. That it is invalid for the reason also, that it was not approved by the Chancellor or by a master in chancery.

5. That Mr. Clarke having previously mortgaged the premises in fee to Henry Simmons, had exhausted his power over the subject, and had no competent authority to sell and convey the same to De Grasse.

6. That the subsequent conveyance of a part of the premises, as set forth in the case, made by George De Grasse, did not restore the title to that part of such grantee or his assigns, valid against the plaintiffs.

In support of these positions, the plaintiffs make the following points:—

First Point.—The acts of the Legislature changed the equitable life estate of Mr. Clarke into a legal estate, but they did not give him the legal estate in remainder. His power over the remainder of the children was a statutory power, and, like all such powers, to be strictly pursued, and when once executed was exhausted.

I. Whether even the trustees appointed by the will took a fee is not certain. In *Clarke* v. *Van Surlay*, 15 Wend. (N. Y.), 442, it was conceded that "the legal interest in the property under the will was in the *cestuis que trust*."

It is a general rule in the construction of devises, that trustees take no greater estate than is necessary to support the trusts, whatever words of inheritance may have been used. *Stanley* v. *Stanley*, 16 Ves., 491; *Doe* v. *Simpson*, 5 East, 162; *Doe* v. *Nichols*, 1 Barn. & C., 336; *Doe* v. *Needs*, 2 Mees. & W., 129; *Warter* v. *Hutchinson*, 3 Dowl. & Ry., 58; Hill on Trustees, 240.

II. But if the testamentary trustees took a fee, their estate, when devested, did not pass to Mr. Clarke alone. It passed to him and his children; to him for life, and to his children in fee. The reasons are,—

1. There is no language in any of the acts expressly giving the fee to him. On the contrary, the expressions seem carefully chosen to avoid that conclusion. He is "authorized and empowered to execute and perform every act, matter, and *518] thing, in like manner, and with like effect, that trustees duly appointed *under the said act might have done." (Sec. 2 of second act.) This is language appropriate to a power, not to a conveyance. It clothes him, not with the estate, but with a power in trust. The word "trustee," used in reference to him, has not of itself force enough to give him the fee. He was, both in popular and in legal phrase, trustee

of a power. He was to have the proceeds invested in his name as trustee. (Sec. 8 of second act.) The expression is not so strong as that in the preamble of the second act,—"whereby the said real estate became exclusively vested in the said Thomas B. Clarke and his children."

The fee not being expressly given to Mr. Clarke, if he took it at all, he took it by implication. But a fee by implication is never allowed, except where it is necessary to the purposes of the trust; and here it was not necessary, for everything which he was to do could be-done under the power as well, and far more safely to the rights of the children.

2. To give Mr. Clarke the fee for the execution of the trust, would involve this absurdity, that it would suppose a conveyance by him after his death. The testamentary trustees, if they took the legal estate, were to convey to the children at Mr. Clarke's death. That is a sufficient reason why he was not, and could not be, put in the place of those trustees.

3. If the fee was given to Mr. Clarke, at the passing of the second act, it must either have been then taken out of the children to be vested in him, or it must have been in abeyance since the passing of the first act. That discharged the trustees under the will. (Sec. 1 of first act.) If, then, the children were not vested with the fee, it remained in abeyance. But abeyances are not favored, nor are they allowed by construction or implication. Com. Dig., *Abeyance*, A. 3; *Catlin* v. *Jackson*, 8 Johns. (N. Y.), 549.

If, however, as we contend, the fee was then in the children, there was no reason for taking it out, and vesting it in the father. To do so would, besides, have been open to grave constitutional objection. It would have exposed the estate of the children to a peril, for which there was no necessity, real or supposed.

III. If Mr. Clarke was not vested with the legal estate in remainder, he was clothed with a statutory power,—a common law authority, as defined by Mr. Sugden. "A power given by a will, or by an act of Parliament, as in the instance of the land-tax redemption acts, to sell an estate, is a common law authority." 1 Sugd. on Powers, 1.

A power is to be strictly pursued. *Doe* v. *Lady Cavan*, 5 *T. R., 567; *Doe* v. *Calvert*, 2 East, 376; [*514 *Cholmeley* v. *Paxton*, 3 Bing., 207; *Cockerel* v. *Cholmeley*, 10 Barn. & C., 564; 3 Russ., 565; 1 Russ. & M., 418; 1 Cl. & F., 60; 2 Sugd. Pow., 95, 197, 198, 330, 331, 413.

And a statutory power in particular. *Rex* v. *Croke*, Cowp., 26; *Collett* v. *Hooper*, 13 Ves., 255; *Richter* v. *Hughes*, 2 Barn. & C., 499; *Proprietors of Stourbridge Canal* v. *Wheeley*, 2

Barn. & Ad., 792; *Lessee of Carlisle* v. *Longworth*, 5 Ohio, 370; *Smith* v. *Hileman*, 1 Scam. (Ill.), 324; *Sharp* v. *Spier*, 4 Hill (N. Y.), 76; *Williams* v. *Peyton's Lessee*, 4 Wheat., 77; *Thatcher* v. *Powell*, 6 Id., 119.

The leases under ecclesiastical statutes in England are instances. Bac. Abr., *Leases*, E. 2; Cro. Eliz., 207, 690.

Wherefore, not having pursued his authority, Mr. Clarke conveyed nothing by his deed.

IV. A statutory power once fully executed is exhausted. "An authority once well executed cannot be executed *de novo*." 3 Vin. Abr., p. 429, § 42; *Palk* v. *Lord Clinton*, 12 Ves., 48; *Barnet* v. *Wilson*, 2 Younge & Coll., 407; 1 Sugd. Pow., 359.

Therefore Mr. Clarke, having once fully executed his authority by a mortgage to Simmons, could not execute it again by a conveyance to De Grasse.

Second Point.—If, however, Mr. Clarke were to be deemed vested with the legal estate in remainder, he was disabled from alienation, without the consent of the Chancellor. (Sec. 3 of second act.)

If he took the fee, he took it qualified, and with a restricted power of disposition. The general rule of law, that he who has the legal estate can convey the legal estate, was modified in his case. It might have been so modified by deed at common law. *M'Williams* v. *Nisly*, 2 Serg. & R. (Pa.), 513; Burton on Real Property, 11, note; *Doe* v. *Pearson*, 6 East, 173; *Perrin* v. *Lyon*, 9 Id., 170. The private acts of the Legislature, whence he derived his right, were laws repealing to that extent the general law. *M'Laren* v. *Pennington*, 1 Paige (N. Y.), 102; *Hibblewhite* v. *M'Morine*, 6 Mees. & W., 200; *Myatt* v. *St. Helens Co.*, 1 G. & D., 663; *Earl of Lincoln* v. *Arcedeckne*, 1 Collyer, 98.

There is now a general law in New York, that a conveyance by a trustee, in contravention of the trust, is void. 1 Rev. St., 730, § 65. This is but an extension to all cases of the principle established for this case by these private acts.

Instances of restricted powers of alienation, imposed upon the fee, are not uncommon. The case of Indian lands is a familiar instance. See also *Prince's case*, 8 Co., 1.

*515] *The consent of the Chancellor was interposed as a check upon Mr. Clarke. The first act did not prescribe it for the trustees to be appointed by the Chancellor; but when, by the second statute, the tenant for life was authorized to act, the consent of the Chancellor was required, for the protection of the infant children.

Third Point.—Mr. Clarke was also disabled from alienation, except for a money consideration.

The acts give no authority to do more than to sell or to mortgage. The purpose was to raise funds for investment.

The first act provides, that the trustees shall invest the "proceeds in any public stock of the United States, or of this state, or bank stock, or shall put the same out at interest on real security." (Sec. 3 of first act.)

Section fourth of the same act provides, that the "principal sum of money arising from the said sales" shall be held, &c.

Section third of the second act provides, that the Chancellor shall "direct the manner in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in the said Thomas B. Clarke as trustee."

The third act is still more explicit. It authorizes Mr. Clarke, under the order before granted, or any subsequent one, "either to mortgage or to sell the premises, which the Chancellor has permitted, or hereafter may permit him to sell, as trustee, under the will of Mary Clarke, and to apply the money, so raised by mortgage or sale, to the purposes required," &c.

If "to sell and dispose of" included every kind of alienation, it included a mortgage, and the third act was unnecessary.

On a similar expression in a will, the Supreme Court and Court of Errors of New York held, that a sale must be for cash, or something which could be invested. *Waldron* v. *McComb*, 1 Hill (N. Y.), 111, and *Bloomer* v. *Waldron*, 3 Id., 361, and though the Court of Errors reversed the first judgment, they did not impugn the principle. 7 Id., 335.

So, also, in the case of *Darling* v. *Rogers*, 22 Wend. (N. Y.), 486, it was held by the Court of Errors, that the words "to sell" did not include the power to mortgage.

Answer,—but it is not so in cases where for payment of debts; then may mortgage. 5 Johns. (N. Y.), 43. No sale in fact, yet legal title passed.

Fourth Point.—The Chancellor's order of March, 1817, did not authorize any conveyance, and least of all a conveyance for such a consideration as this, unless it were approved by a master.

The language is, "Provided, nevertheless, that every sale and *mortgage and conveyance in satisfaction, that [*516 may be made by the said Thomas B. Clarke, in virtue hereof, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises."

The defendant claims, that this qualification applies only to the conveyance in satisfaction; the plaintiffs, that it applies

to every deed or mortgage that might be made. That the matter is the true construction is obvious because,—

I. The statute provides that in case of any part of the estate should be made with the assent of the Chancellor to such sale who was at the time of giving the assent to direct the mode in which the proceeds of so much as he should think proper should be vested in Mr. Clarke as trustee. This implies that the Chancellor's consent was to be given to every sale.

The Chancellor delegated the power as a master of his court. Supposing such a delegation lawful, the power was to be exercised in every sale. The reason is therefore, to a conveyance in satisfaction of a debt, to prevent the Chancellor's order, but to repeal the statute.

II. The language of the other head is free from ambiguity: it being this:—"Provided, nevertheless, that every sale and mortgage and conveyance in satisfaction that may be made by the said Thomas B. Clarke in virtue hereof, shall be approved," &c.

This is a repetition of the words previously used to express, 1. a sale for cash, 2. a mortgage for cash, and 3, a conveyance in satisfaction. So in the last part of the sentence, the words are repeated with added emphasis. The approval is to be indorsed on "every deed or mortgage that may be made in the premises." It does not seem a fair interpretation to construe this to mean not "every deed or mortgage that may be made in the premises," but a particular kind of deed, namely, a conveyance in satisfaction of an antecedent debt.

III. The ruling of the state court on this point was made with great hesitation. Judge Bronson gave no reasons for his opinion. It does not appear to have been discussed at the argument in the Supreme Court. In the Court of Errors, the Chancellor said, "Upon this point, I concur, though with much hesitation;" in the conclusion, that the restriction was only intended to apply to sales and conveyances in satisfaction of debts. (20 Wend. (N. Y.), 379.) He overlooked altogether the word "mortgage," twice used in the same sentence. Mr. Verplanck, who delivered the only other opinion, was clear that the restriction *applied to sales and mortgages, as well as conveyances in satisfaction. (20 Wend. (N. Y.), 386, 387.) What were the opinions of the remaining members of the court does not appear.

*517]

But the opinions of the courts of New York do not bind the courts of the United States, in the construction of a writing like this. In the case of a will, this court rejected the con-

struction given by the courts of Mississippi. *Lane* v. *Vick*, 3 How., 464.

In the present case, however, the conveyance was not for cash, but chiefly in payment and satisfaction of a debt, and therefore, within the decision of the Supreme Court and Court of Errors of New York, it should have been approved by a master.

Not having been so approved, it was void.

Fifth Point.—So far as the order sanctioned a conveyance for any other than a money consideration, it was unauthorized by the acts, and therefore beyond the Chancellor's jurisdiction. Consequently it gave no force to the title.

In acting under these private statutes, the Chancellor exercised a special and limited jurisdiction, and where he exceeded his jurisdiction his acts were void. The proceeding was not by suit between party and party, where an appeal could be had from an erroneous determination.

Cases of this kind are numerous in the books. In New York, the cases upon assessments are familiar instances. *Striker* v. *Kelly*, 7 Hill (N. Y.), 9; *Matter of Beekman Street*, 20 Johns. (N. Y.), 271; *Matter of Third Street*, 6 Cow. (N. Y.), 571.

So in cases of partition. *Deming* v. *Corwin*, 11 Wend. (N. Y.), 647.

So in cases of bankruptcy, jurisdiction to grant the discharge must be specially shown. *Sackett* v. *Andross*, 5 Hill (N. Y.), 330; *Stephens* v. *Ely*, 6 Hill (N. Y.), 607.

Other cases in the state courts:—*Yates* v. *Lansing*, 9 Johns. (N. Y.), 431; *Borden* v. *Fitch*, 15 Johns. (N. Y.), 141; *Bloom* v. *Burdick*, 1 Hill (N. Y.), 139; *Rogers* v. *Dill*, 6 Id., 415; *Wickes* v. *Caulk*, 5 Har. & J. (Md.), 42; *Pringle* v. *Carter*, 1 Hill (S. C.), 53. See also *Fisher* v. *Harnden*, 1 Paine, 55.

In the English courts:—Shelford on Lunatics, 375; *Matter of Janaway*, 7 Price, 690.

"If a conveyance were made by an infant, even under the order of the court, it would not be valid, if he were not within the act of Parliament. These things, I am sorry to observe, pass too often *sub silentio*." By the Lord Chief Justice Baron, in *The King* v. *Inhabitants of Washbrook*, 4 Barn. & C., 732.

There are many cases in this court, which go to the same point. *Griffith* v. *Frazier*, 8 Cranch, 9; *Thatcher* v. *Powell*, 6 *Wheat., 119; *Elliot* v. *Peirsol*, 1 Pet., 340; [*518 *Bank of Hamilton* v. *Dudley's Lessee*, 2 Id., 523; *Wilcox* v. *Jackson*, 13 Id., 498; *Shriver's Lessee* v. *Lynn*, 2 How., 43; *Lessee of Hickey* v. *Stewart*, 3 Id., 750.

In this case the "subject-matter" over which the Chancel-

lor had jurisdiction by these private statutes was not the real estate, for then he might have authorized its alienation by another person than Mr. Clarke; nor was it every alienation by him, for then a mortgage or an exchange might have been authorized under the first act; but it was to determine whether or not the circumstances were such as to justify his assent to a sale or mortgage for cash, and upon a sale or mortgage to superintend the application of the proceeds. When he went beyond this, his act was *coram non judice*, and void.

There are two fatal errors in the Chancellor's order of the 17th of March:—

1. He could not delegate his power to a master at all. The authority was personal, and to be exercised by himself. It was not the discretion of a master, but the discretion of the Chancellor, that was trusted.

2. He could not authorize a conveyance in satisfaction of Mr. Clarke's debts. The statutes gave him no such authority; and if they had, they would have been void, for the Legislature had not power to appropriate one person's property to the debts of another.

And even if it were held, that the Chancellor could delegate the power of consenting, and the order were construed to allow a sale with the consent of a master, there would be a further and insurmountable objection to it; that the consent of the Chancellor, either directly or through a master, could not be dispensed with, according to the letter or spirit of the statutes.

The Chancellor conferred upon Mr. Clarke no portion of his authority; that came directly from the statutes. The Chancellor could neither give it, nor enlarge it. The lands, if they passed at all, passed by force of the statutes. The Chancellor had no power, except to dissent from the sale; to interpose his veto. He could not even compel Mr. Clarke to act; he could only say when he should not act, and if he acted, what should be done with the proceeds of the estate.

Sixth Point.—The subsequent conveyance of a part of the property to a purchaser, for value, and without notice of the defect in the title, did not make the title valid, as against the plaintiffs.

This is so upon general principles. If the conveyance by *519] Mr. Clarke did not divest the plaintiffs' title, the subsequent *transfer did not. There is no principle of law which would make De Grasse give a better title than he had.

In most of the cases, upon defective execution of authority, the property was in the hands of innocent holders. *Wilson*

v. *Sewall*, 1 Bl., 617; *Bloom* v. *Burdick*, 1 Hill (N. Y.), 180; *Rogers* v. *Dill*, 6 Id., 415.

There is no room here for an estoppel. The children were neither parties nor privies to the conveyance to De Grasse. They take as devisees under the will. See *Roe* v. *York*, 6 East, 86; *Roxburghe Feu case*, 2 Dow., 189.

Mr. John Jay, for defendant.

Defendant's Points on the Eight Questions stated in the Certificate.

I. The acts of the Legislature stated in the case divested the estate of the trustees under the will of Mary Clarke, and vested the whole estate in fee in Thomas B. Clarke, as trustee in their place and stead.

1. To determine the meaning and scope of these acts, we must discover what were then understood to be the interests and rights of the parties to be affected by them; and for this purpose we must refer to the judicial decisions which governed the courts and the Legislature at the time of their enactment, even though these decisions have been departed from by later judges; for it would be contrary to the first principles of law and justice to give to long subsequent adjudications a retroactive operation in the interpretation of ancient statutes; and such a course would lead to the worst evils of *ex post facto* legislation in regard to vested and sacred rights. 2 Inst., 292; 1 Kent. Com., 461; *Doe* v. *Allen*, 8 T. R., 504, per Ld. Kenyon.

2. The trustees under the will took the legal estate in fee in the premises in question. This is clear from the language of the devise, and from the powers given to them to lease the premises during Clarke's life, and to convey to the parties who should become entitled to the same on his decease.

3. The children, as they came *in esse*, were then supposed to take, under the will of Mary Clarke (according to the uniform ruling of all the courts, both in England and America, at that time, and for a long time previously), not a vested remainder in fee, liable to open and let in after-born children, and subject to be defeated by their death during Clarke's life, but simply a contingent remainder dependent upon their surviving their father, and that remainder (excepting so far as *their interest in the premises was enlarged by the acts of the Legislature passed with Clarke's assent) was then regarded as amounting, during their father's life, to a mere presumptive title, a naked possibility, uncoupled with any immediate beneficial interest. *Denn d. Radcliffe* v. *Bagshaw*, 6 T. R., 512, in the King's Bench, per Lord Kenyon, [*520

and all the judges, in the year 1796. *Doe* v. *Scudamore*, 2 Bos. & P., 289, per Lord Eldon, C. J., and Heath, Brooke, and Chambre, JJ., in 1800. *Roe* v. *Briggs*, 16 East, 406, per Ld. Ch. J. Ellenborough, in 1802:—"That no case had been shown where an estate depending on such a contingency had ever been held vested." *Doe* v. *Provost*, 4 Johns. (N. Y.), 61, in 1809, per Justice Van Ness; Kent, C. J., and Thompson and Yates, JJ., concurring. See this case commented upon and sustained in *Hawley* v. *James*, 16 Wend. (N. Y.), 242 *et seq.* *Dunwoodie* v. *Reed*, 3 Serg. & R. (Pa.), 435, in 1817, per Tilghman, C. J., and Gibson, J. See remarks of Savage, C. J., in *Coster* v. *Lorillard*, 14 Wend. (N. Y.), 311, on the question of remainders dependent on survivorship, showing the conflicting definitions of the statute and common law, and thus accounting for the discrepancy between the former and the later decisions. See note, 4 Kent Com., 261, on the case of *Jackson* v. *Waldron*, 13 Wend. (N. Y.), 178, affirming the judgment of the Supreme Court in *Pelletrau* v. *Jackson*, 11 Id., 121, per Nelson, J. 2 Bl. Com., 170; Fearne on Cont. Rem.; Prest. on Abs., 21; Cruise, title 16, *Remainder*, ch. 1, §§ 10 to 27; Jickling's Analogy of Legal and Equitable Estates; *Dixon et ux.* v. *Pickett*, 10 Pick. (Mass.), 517, *Blanchard* v. *Brooks*, 12 Id., 47, per Shaw, C. J. (pp. 63 and 64); *Davis* v. *Norton*, P. Wms., 392; *Duffield* v. *Duffield*, 3 Bligh, N. S., 260, 329, 355, per Best, C. J., on character of a contingent estate; *Jackson* v. *Waldron*, 13 Wend. (N. Y.), 214 *et seq.*, per Tracey, Senator.

4. Thomas B. Clarke, under the will, took an equitable *life* estate, and after the transfer to him, by the act of the Legislature, of the contingent estate of Clement C. Moore, the whole estate in remainder was alternate between Clarke and his children, dependent upon the like contingency of survivorship.

5. In whatever light the estate of the children be regarded, the interest of Clarke in the premises in question was larger than theirs; for the life estate was absolutely his, and the remainder was limited on the same condition to each,—to wit, survivorship; and as the case shows that one moiety of the devised premises was carefully reserved by the acts of the Legislature and the orders of the Court of Chancery, for the benefit of the children, it is clear that, in addition to *521] the benefit they *derived from the other moiety, which was partly disposed of, they have received a larger share of the estate than they would have been entitled to, had an equitable division of their relative interests been made between

them and their father when the acts and orders were passed and made.

6. The acts having been adjudged constitutional and valid, the only question here is as to their meaning; and since they were remedial statutes, they are to receive an equitable interpretation, by which the letter of the act is sometimes enlarged and sometimes restrained, so as more effectually to meet the beneficial end in view, and to prevent a failure of the remedy. The intention of the Legislature is to be deduced from a view of the whole, and the real intention is to prevail even over the literal sense of the words. Dwarris on Statutes; 1 Kent Com., 461; *Cochran* v. *Van Surlay*, 20 Wend. (N. Y.), 365, per Bronson, J.

7. The first act of the Legislature, April 1, 1814, discharging the trustees under the will, and providing for the appointment of new trustees by the Court of Chancery in their place and stead, and directing that such new trustees may lease all or any part of the land for a term not exceeding twenty-one years, and may sell or dispose of a moiety in their discretion, and declaring that they shall be decreed and adjudged trustees under the will, in like manner as if they had been named therein, clearly divested the trustees under the will of their legal estate in the land.

The trustees had no beneficial interests. They were liable to be removed by the Court of Chancery. There was nothing in their appointment under the will, and their acceptance of the trust, which can be construed as a contract, of which their removal was an unconstitutional violation; for the reason, among others, that the Constitution protects only such contracts and vested rights as are beneficial, and not such as are merely onerous; and in this case the objection could only be taken by the trustees themselves; and they not only assented to the act, but solicited its passage; and the change of trustees, being avowedly for the benefit of the children, was within the clearest parental authority of the legislature. Cruise, title *Private Acts; Townley* v. *Gibson*, 2 T. R., 701.

8. The first act not only divested the trustees of their estate, but provided for its transfer without diminution to new trustees, to be appointed by the Chancellor. The second act, of March 24, 1815, in the absence of such appointment, created Clarke the new trustee, clothed him with all the powers specified in the former act, and, with abundant care lest any thing should be omitted, authorized him to execute and perform *every act, matter, and thing in relation [*522 to the real estate, in like manner and with the like effect that trustees under the former act might have done; and made

[illegible] by the Chancellor for his [illegible] vested in Thomas B. Clarke. The estate [illegible] could only have been the legal as there was then [illegible] for investment. And the third act, passed March 24, 1815, again distinctly recognized him as trustee under the will of Mary Clarke. He could not have been the trustee for himself: for that trust had merged in the legal estate: he was therefore trustee only of the remainder.

9. The acts cannot be fairly construed as conferring upon Clarke only a power in trust: for, apart from the express recognition of him by the second act, as vested with the estate, the intention to vest it in him may be collected from all the acts taken together. To suppose that the legal estate was intended to be left in the original trustees, after they were "discharged from the said trust," is not only unreasonable, but utterly irreconcilable with the exercise by Clarke of the rights and duties conferred and imposed upon him,—such as the leasing all or any part of the land (§ 5, Act of April 1, 1814), receiving the rents and profits, and doing other acts requiring and implying the possession of a legal estate. *Goodright d. Revell and others* v. *Parker and others*, 1 Man. & Sel., 692; *Doe d. Gillard* v. *Gillard*, 5 Barn. & Ald., 785; *Doe d. Beezley* v. *Woodhouse and others*, 4 T. R., 89.

The words "authorize and empower," in the act, cannot have the effect of turning this into a mere power. They simply declare the trusts for which Clarke was already appointed, and for the execution of which he was vested with the estate. *Brown* v. *Higgs*, 5 Ves., 506, per Ld. Kenyon.

10. It has been judicially held, in New York, that the acts did vest the legal estate in Clarke as trustee. Per Walworth, Ch., in *Clarke* v. *Van Surlay*, 20 Wend. (N. Y.), 877.

And this court will, in accordance with their general practice, follow the ruling of the state tribunals. *Swift* v. *Tyson*, 16 Pet., 19.

II. The authority given by the said acts to the trustee to sell, was not a special power to be strictly pursued, but he was vested with the absolute power of alienation, subject only to re-examination and account in equity.

1. By the act of April 1, 1814, the broadest powers of sale were conferred on the trustees therein provided for. By § 2 of the act of March 24, 1815, the same powers were conferred
*528] on Clarke in express terms. He was authorized and empowered *to execute and perform every act, matter, and thing in relation to the real estate, in like manner and

with like effect that trustees under the former act might have done.

2. This language is only consistent with the supposition, that Clarke held the trust estate in fee under the will. It is irreconcilable with the supposition that he was acting under a special power, to be strictly pursued.

3. The doctrine of naked power is odious, as often leading to grievous injustice; and the court will not so construe the act, if it will bear any other construction. 4 T. R.; 1 Kent Com., 461.

4. The further provision of the act directing the annual accounting before the Chancellor, that the Chancellor might see that Clarke had duly performed the trust reposed in him, was personal to Clarke, and did not abridge the powers conferred upon him as trustee.

III. and IV. The orders set forth in the case made by the Chancellor are to be regarded as the acts of the Court of Chancery of the state of New York, and not as the doings of an officer under a special authority.

The Chancellor, in a court of law, must be assumed to have had competent authority, under the acts, for every order which he made in the matter, whether such order allowed a sale for any other consideration than cash paid or not.

1. That the assent and direction of the Chancellor in this case, required and given under the acts, was a judicial proceeding, not to be assailed collaterally in a court of law, was held in the courts of New York by Mr. Justice Cowen, *Clarke* v. *Van Surlay*, 15 Wend. (N. Y.), 447; Chancellor Walworth, in *Cochran* v. *Van Surlay*, 20 Id., 378; Mr. Senator Verplanck, Id., 384.

2. The accountability of Clarke to the Chancellor was a continuance of the accountability which rested upon the trustees under the will, and which was expressly intended by the first act of the Legislature (§ 6) to rest upon their successors, and which properly belonged to his position as trustee. 2 Story, Eq. Jurisp., §§ 960, 974, 978; 2 Fonb., 36, note; 3 Ves., 9.

3. The presumption of the acts of the Chancellor being judicial, even if no reference to the Court of Chancery had been made in the former act, would result from the appointment of a judicial officer having exclusive jurisdiction over matters of trust and the estates of infants; and the fact that the rights of Clarke, as life tenant and contingent remainderman, and the rights of the children in the proceeds of sales and in the profits, required judicial adjustment, not according to the technical and unbending rules of the common law, but

at the hands of the presiding *officer of the high court of equity, having authority to take a wider range, as the interest of the parties might require. *Fisher* v. *Fields*, 10 Johns. (N. Y.), 505, per Kent Ch.; 2 Story Eq. Jur., § 831.

4. The contemporaneous action, under the acts, by the Chancellor, was judicial, and not ministerial, and that action is evidence of the true construction of the acts. The act of 1816 refers to the proceedings already had by the Chancellor, and adopts them, and thus gives a legislative exposition of the prior act, showing them to have been judicial; and being judicial, they cannot be impeached collaterally.

5. That the Chancellor regarded his acts as the acts, not of an individual, but of the High Court of Chancery, and that he regarded that court as having exclusive jurisdiction in the future of all matters connected with the sales and mortgages, is clear from the repeated permission given in the successive orders to "all parties interested, or to become interested, in the premises, to apply to the court at any time or times thereafter, for further orders or directions."

6. Of that permission the plaintiffs should have availed themselves, if Clarke had in any thing abused his powers, to enforce the trust and recover the purchase-money, instead of seeking to reveiw the orders of a Court of Chancery in ejectment suits at common law. Mitf. Pl., 133; 2 Story Eq. Jurisp., § 1127; 2 Madd. Ch., 125; *Potter* v. *Gardner*, 12 Wheat., 499, per Marshall, C. J.

V. and VI. The deed executed by Clarke to De Grasse, for the premises in question, is valid, even if it were given for a consideration other than cash paid on the purchase, (of which there is no proper evidence,) and without having a certificate indorsed thereon, that it was approved by a master in chancery, supposing Clarke to have taken only a power in trust.

1. Under the acts of the legislature Clarke had authority to sell and dispose of the land, in such manner, and upon such terms, as he might deem best for the interest of the several parties. The Chancellor had full authority under the acts to assent to a sale in satisfaction, if Clarke thought such a disposition of the land expedient, the terms being altogether in Clarke's discretion, and that assent being judicially given is not to be questioned.

The rules fixed by the Chancellor for Clarke's guidance in regard to the valuation, and approval, and certificate of a master, in certain cases, were merely directory to the trustee, and not conditions precedent to the validity of the sale, and no omission can invalidate the exercise of Clarke's power given

by *the act nor of the deed to De Grassse given under it. *Mineuse* v. *Cox*, 5 Johns. (N. Y.) Ch., 447, per Kent, Chancellor, in a closely analogous case.

2. But the legal estate being necessarily vested in Clarke, as already shown, the deed to De Grasse conveyed a title absolute in a court of law, whether the conditions of the trust had been complied with or not. The plaintiffs are estopped at law, though not in equity, from impugning a deed duly executed by the trustee, and their remedy for any supposed fraud or breach of trust is in equity alone. *Taylor* v. *King*, 6 Munf. (Va.), 366, per Roane, J.; per Cowen, J., in *Clarke* v. *Van Surlay*, 15 Wend. (N. Y.), 447; per Walworth, Ch., in *Cochran* v. *Van Surlay*, 20 Id., 378, 379.

VII. The fact that Clarke had previously mortgaged the premises in fee to Henry Simmons, did not at all affect his competent authority to sell and convey the same to De Grasse.

The power given to Clarke as trustee was not one which called only for a single execution. The words "either" and "or" are not alternative, but distributive, and the beneficial intent of the act not having been satisfied by the execution of the mortgage, the power to sell survived. *Omerod* v. *Hardman*, 5 Ves., 732.

VIII. If it be assumed, (which is hardly possible,) that Clarke had only a naked power, that the rules fixed by the Chancellor were conditions to its exercise, and that the loose and random recollections of the witness who testified touching the consideration of the deed to De Grasse were admissible, and sufficient evidence on that point, still the title of a *bonâ fide* purchaser, without notice, cannot be questioned in a court of law, for the want of the master's certificate required to conveyances in satisfaction, for the reason that the deed on its face was a deed for cash, executed in legal conformity to the power, and the remedy of the plaintiff is in equity, where the payment of the purchase-money might be enforced. Sugd. on Powers, ch. 11, §§ 1 and 2; *Wood* v. *Jackson*, 8 Wend. (N. Y.), 32; *Anderson* v. *Roberts*, 10 Johns. (N. Y.); *Jackson* v. *Terry*, 18 Id., 471, per Thompson, C. J.; *Astor* v. *Wells*, 4 Wheat., 487; *Bean* v. *Smith*, 2 Mason, 273; *Fletcher* v. *Peck*, 6 Cranch, 141; *Jackson* v. *Henry*, 16 Johns. (N. Y.), 195; *Jackson* v. *Van Dolsen*, 5 Id., 43; *Franklin* v. *Osgood*, 14 Id., 527.

Further Points in favor of the Defendant.

I. By the act of March 24, 1815, it was provided that Clarke should account annually to the Chancellor, or to such person as he might appoint, for the principal of the proceeds of each

sale made by him, and if on such return, or at any other time, and in any other manner, the Chancellor should be of opinion that Clarke had not duly performed the trust by that act reposed in him, he was authorized to remove Clarke from his said trust, and appoint another in his stead.

There is no proof in the case that the Chancellor ever removed Clarke, as he was bound to do, if he thought he had not duly performed his trust, or that the Chancellor ever disapproved of the sale to De Grasse, or of the consideration thereof. On the contrary, it appears from the offers of evidence made by the plaintiffs, that on the 31st of March, 1836, Clarke was still acting as trustee and making sales, and it is therefore a sound legal presumption, that the Chancellor approved of this conveyance, and of Clarke's conduct generally; for had he disapproved of them, Clarke would have been removed or enjoined, as the plaintiffs say he was, at the instigation of the children, at a later period.

The Chancellor had been by the act "virtually made the trustee of the property," (per Jones, Ch., in *Sinclair* v. *Jackson*, 8 Cow. (N. Y.), 548, quoted and approved by Verplanck, Senator, in *Cochran* v. *Van Surlay*, 20 Wend. (N. Y.). 387,) and the care and exactness exhibited in the orders contained in the case forbid the imputation of carelessness or neglect in his fulfilment of the important duties specially imposed upon him by the Legislature. He must be presumed to have done his duty intelligently, diligently, and faithfully, and that presumption which forbids the supposition that the premises in dispute were disposed of fraudulently or improperly is to govern in this court until overthrown by positive proof to the contrary. Best on Presumption of Law, 63, and cases cited · Co. Litt., 103 and 232, *b*; Dig. lib. 50, title 17; *Sutton* v *Johnstone*, 1 T. R., 503; Cowen and Hill's Notes to Phill. on Ev., 205, *et seq.*

II. The conveyance to De Grasse was made 29 March, 1822; this suit was commenced in 1845. Although the marriage of Mrs. Williamson, in 1827, before the completion of her infancy, has saved her from being barred by the statutes of limitation, the singular and unexplained want of diligence and vigilance on the part of the plaintiffs in seeking to enforce their claims, if any they had, to these premises, until after the lapse of so many years of acquiescence and delay, and when the true state of the transaction has been forgotten, or become incapable of explanation, do not entitle them to the favorable consideration of the court; for they have slept upon their rights, and have thereby created a difficulty and imposed a hardship, misleading innocent parties by their silence. 2

Ball & *B., 433; *Hawley* v. *Cramer*, 4 Cow. (N. Y.), 488, per Walworth, Ch.; *Broadhurst* v. *Balguy*, 1 Younge & Col. N. R., 16, 28 to 32; 2 Story Eq., §§ 1284, 1520, and cases quoted in note *c*; *Wendell* v. *Van Rensselaer*, 1 Johns. (N. Y.) Ch. 354, per Livingston, Ch.; *Higginbotham* v. *Burnet and others*, 3 Id., 184, per Kent, Ch.; *Roberts* v. *Tunstall*, 4 Hare, 263, per Wigram, V. Ch.

III. The length of time which has elapsed since the conveyance to De Grasse, coupled with the fact that this very deed has been sustained by the court of last resort in the state of New York, after prolonged litigation, will incline this court to give to the acts of the Legislature and the order of the Chancellor, in questions of doubt, the most favorable interpretation for the maintenance of the title, and the protection of the rights of *bonâ fide* purchasers and encumbrancers. The best interests of society demand that causes of action should not be deferred an unreasonable time, and this remark is peculiarly applicable to suits in ejectment, since nothing so much retards the growth and prosperity of the country as the insecurity of titles. Per McLean, J., in *Lewis* v. *Marshall*, 5 Pet., 470. Per Marshall, C. J., in *Bell* v. *Morrison*, 1 Pet., 360.

Mr. Wood, for defendant.

I. The three trustees under the will of Mary Clarke took the legal estate in fee, in the premises in question, in part. Thomas B. Clarke took an equitable estate in said premises during his life; and his children took an equitable estate in remainder in fee; and Clement C. Moore took an alternate equitable remainder in fee, in case of failure of the issue of said Thomas B. Clarke.

II. Assuming Clarke to take a life estate with a limitation in remainder to his issue, such limitations of remainders in the alternative are lawful and valid. *Luddington* v. *Kime*, 1 Ld. Raym., 203.

III. The legal estate of the trustees was not executed by the statute of uses, by transferring it to the parties entitled to the equitable estates and interest in fee.

An important act on the part of the trustees was required to be done, viz., the conveyance to the children in fee after the death of Thomas B. Clarke, or in the alternative to Clement C. Moore. The trust was therefore active, and not executed by the statute. *Mott* v. *Buxton*, 7 Ves., 201. *Leonard* v. *Sussex*, 2 Vern., 526.

IV. The legal estate in the hands of the trustees involved *the power to lease, such power being neces- [*528

sary for the production of rents and profits of city property. *Attorney-General* v. *Owen*, 10 Ves., 560.

V. By the act of 1815, the legal estate in the three trustees named in the will was transferred to Thomas B. Clarke in trust.

1st. The language of the act shows an intention to transfer it, and not to confer upon him a mere power in trust.

2d. It is not necessary that words of grant should be found in the act. The intention to vest him with the legal estate may be collected from the context. *Euchelah* v. *Welsh*, 3 Hawks, &c., 155. It is unreasonable to suppose the legal estate was meant to be left in the original trustees under the will, after they were stripped of the trust, and when they had no beneficial interests.

3d. Under the second section of said act, all the rights and duties are conferred upon him which would have devolved upon the trustees under the act of 1814, by the fifth section of which they were to lease from time to time, receive rents and profits, and do other acts requiring a legal estate.

4th. A legal estate in trust may be implied even in private instruments, when the acts to be done are such as to render it proper and essential that the trustees should have the legal estate, and not a mere trust power. *Griffiths* v. *Smith*, Moo., 753; *Goodright* v. *Parker*, 1 Mau. & Sel., 692; *Doe* v. *Cundall*, 9 East, 400; *Doe* v. *Gillard*, 5 Barn. & Ald., 785; *Anthony* v. *Rees*, 2 Cromp. & J., 75; *Carter* v. *Barnardiston*, 1 P. Wms., 505; *Thong* v. *Bedford*, 1 Bro. C. C., 313; *Striker* v. *Mott*, 2 Paige (N. Y.), 389; *Brewster* v. *Paterson*, Court of Appeals, S. P., on this same will, in M., 5; *Doe d. Beezeley* v. *Woodhouse*, 4 T. R., 89; *Oates* v. *Cooke*, 3 Burr., 1685.

VI. The act divesting the trustees under the will of the legal estate in trust was not unconstitutional.

1st. They had no beneficial interests. Their functions were under the control of equity; they were liable at any time to be removed by the Chancellor. *Livingston* v. *Moore*, 7 Pet., 469; *Wilkinson* v. *Leland*, 2 Id., 267, 660.

2d. The Constitution protects only such contracts and vested rights as are beneficial to the party, not such as are merely onerous.

3d. The objection could only be taken by the trustees themselves, and they assented to the acts displacing their estate and their functions. 2 Pet., 411, 413; *Watson* v. *Mercer*, 8 Id., 88; *Sinclair* v. *Jackson*, 8 Cow. (N. Y.), 543; *Currie's Adm'rs* v. *Mutual Ins. Co.*, 4 Hen. & M., (Va.), 315;

*529] *Cochran* v. *Van Surlay*, 20 Wend. (N. Y.), 387. This last-mentioned case is conclusive* of the whole question,

being the decision of the highest court of the state on a local law.

VII. The sale and conveyance by Thomas B. Clarke, (he having the legal estate,) though he may have departed from his trust, was valid to pass the legal title, and the remedy for any supposed breach of trust is in equity only, not in these suits at law. 1 Sug. on Powers, ch. 11, §§ 1, 2; *Jackson* v. *Van Dalsen*, 5 Johns. (N. Y.), 43.

VIII. Assuming that Thomas B. Clarke takes only a power in trust, his conveyance is valid.

1st. The assent and direction of the Chancellor, required under the act, is a judicial proceeding.

2d. The presumption of its being judicial results from the fact of its being conferred upon a high judicial officer, and the rights of Clarke as life tenant and contingent remainderman, and the rights of the children in the proceeds of sales, and in the profits, required judicial adjustment.

3d. The contemporaneous action under it, by the Chancellor, was judicial, and not ministerial.

4th. Such contemporaneous action is evidence of the true construction of the act.

5th. The act of 1816 refers to these judicial proceedings, adopts them, and thus gives a legislative exposition of the prior act, showing these proceedings of the Chancellor to be judicial.

6th. Being judicial, the orders of the Chancellor are final and conclusive, and cannot be impeached collaterally, though the proceeding is of a summary character. *Moody* v. *Thurston*, Str., 481; 1 Doug., 407; 1 Harg. Law Tracts, 446; 4 Greenl. (Me.), 531; *Henshaw* v. *Pleasance*, 2 Bl., 1174 (note showing the decision overruled); *Doe* v. *Brown*, 8 East, 15; *Grignon's Lessee*, 2 How., 319.

If jurisdiction, but irregular proceeding, final but on appeal. If no jurisdiction, this also decided in *Cook* v. *Van Lear;* for it is not the ordinary jurisdiction of equity, but jurisdiction under special statute.

7th. If not judicial but ministerial, the terms imposed are not conditions, but merely directory, and any omission does not invalidate the exercise of the power and the grant under it. *Mineuse* v. *Cox*, 5 Johns. (N. Y.) Ch., 447; 5 Johns. (N. Y.), 43.

IX. The sales and conveyances are valid to pass the title to the premises in question, and complete a good defence in this suit.

Mr. Webster, for plaintiffs, in reply and conclusion.

I propose to maintain five propositions, which will embrace all the points I mean to submit to the court:—

I. The acts of the Legislature stated in the case, while they devised the estate of the trustees under the will of Mary Clarke, did not vest the whole estate in fee in Thomas B. Clarke.

II. The authority given by the said acts to the trustee to sell was a special power, to be strictly pursued.

III. That, even if it be held that the acts vested a legal estate in fee in Thomas B. Clarke, yet that the same acts imposed conditions and restraints on his power of alienation: and that he could make no lawful or valid conveyance, without having first complied with these conditions and restraints.

IV. That the conveyance made by him, under which the defendant claims, was not made in conformity with these conditions and restraints.

(*Mr. Webster*, after arguing in support of the above propositions, said that he would now ask the attention of the court to a critical examination of the New York decisions, which he contended [illegible] as follows:)

It has been decided in the courts of New York, that the acts of the legislature stated in this case are constitutional.

It has not been decided, that the Chancellor's orders in the case were legal, or within the jurisdiction conferred upon him by the acts; but it has been decided, that, if acting within his jurisdiction, the propriety or legality of his orders could not be examined into, collaterally, in a court of law.

It has been decided, that the Chancellor's order made in this case did not require that a sale, made by T. B. Clarke, when made for money, must have been approved by a master but all the judges who gave reasons for their judgment signified their opinions, that, when a conveyance was made in satisfaction of a debt, such approval, under the Chancellor's order, was indispensable. But no case, turning on this single point, has been adjudged in New York.

It has not been decided by the courts in New York, that, under and by force of the acts, T. B. Clarke took a fee simple estate in the whole property. That question has not directly arisen. Chancellor Walworth, *arguendo*, expressed an opinion in favor of the affirmation of that question. Chief Justice Bronson took the negative of the question as a point conceded.

It has not been decided by the courts of New York, that T. B. Clarke took, by force of the acts, any such estate as that he could make a sale or conveyance, which should be sufficient to pass any title, legal or equitable, without conforming to all the limitations and requisites prescribed in the acts themselves.

*On the contrary, all the courts, and every judge in New York, so far as appears, has proceeded on the ground that those limitations and requisites must be complied with, before any estate, legal or equitable, could be passed by any deed or conveyance which Thomas B. Clarke could make.

All the courts and all the judges in New York have affirmed that these restrictions in the acts do bind the estate, and restrain and limit, *ab initio*, the trustees' power of sale.

Therefore, *Mr. Webster* contended, the attempt now made by defendant's counsel was nothing less than an attempt to overthrow the whole substance of the New York decisions.

Mr. Justice WAYNE delivered the opinion of the court.

This cause has been brought to this court, to get its decision upon questions of law, which were raised upon a case stated in the Circuit Court, upon which the judges of that court differed in opinion.

The suit is an action of ejectment, for the undivided third part of eight lots of land, in the sixteenth ward of the city of New York. The plaintiffs claimed under the will of Mary Clarke. It was admitted by the counsel for the defendant, that Mary Clarke had been seized of the premises in dispute, when she made her will, and when she died in 1802. It was also admitted, that the defendant was the actual occupant of the premises, when the suit was commenced against him.

The premises are a portion of a tract of land, devised by Mary Clarke to "Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and their heirs forever, as joint tenants and not as tenants in common," of "all that part of my said farm at Greenwich aforesaid, called Chelsea," &c., "to have and to hold the said hereby devised premises, to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and to the heirs of such survivor, as joint tenants, and not as tenants in common, in trust, to receive the rents, issues, and profits thereof, and to pay the same" "to Thomas B. Clarke," &c., "during his natural life; and from and after the death of the said Thomas B. Clarke, in further trust, to convey the same in fee, to the lawful issue of the said Thomas B. Clarke, living at his death. And if the said Thomas B. Clarke shall not leave any lawful issue, at the time of his death, then in the further trust and confidence, to convey the said hereby devised premises to my grandson, Clement C. Moore, and to his heirs, or to such person in fee as he may by will appoint, in case of his death, prior to the death of Thomas B. Clarke."

*It was also admitted, that the trustees named in the [*532

will were dead; that Thomas B. Clarke married in 1803; that his wife died in 1815; and that he died in 1826, leaving three children,—Catharine, the wife of Charles H. Williamson, plaintiffs in this suit,—Isabella, now the wife of Rupert Cochran,—and Bayard Clarke, all of whom were still living. Here the plaintiffs rested their case.

The defendant then put his case upon conveyances from Thomas B. Clarke, made, as he says, under legislative enactments of the state of New York and orders of the Chancellor of New York.

The acts and the orders of the Chancellor under them will be the subjects of our consideration only so far as may be necessary to give answers to the points certified to this court. In other words, we will not discuss the quantity of interest which the persons provided for in the devise took under it.

It is right, however, to say, that we concur with the learned judges of the Circuit Court, that, under the will of Mary Clarke, the first-born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let in his other children to the like estate, as they were successively born; and that their vested remainder became a fee *simple* absolute, in the children living, on the death of their father.

The points certified are as follows:—

1. Whether the acts of the Legislature, stated in the case, divested the estate of the trustees under the will of Mary Clarke, and vested the whole estate in fee in Thomas B. Clarke.

2. Whether the authority given by the said acts to the trustee to sell, was a special power, to be strictly pursued, or whether he was vested with the absolute power of alienation, subject only to re-examination and account in equity.

3. Whether the orders set forth in the case, made by the Chancellor, were authorized by and in conformity to the said acts of the Legislature, and are to be regarded as the acts of the Court of Chancery, empowered to proceed as such in that behalf, or the doings of an officer acting under a special authority.

4. Whether the Chancellor had competent authority, under the acts, to order or allow such sale or conveyance of the estate by the trustee, as is stated in the case, on any other consideration than for cash paid on said conveyance.

5. Whether the deed executed by Thomas B. Clarke to George De Grasse, for the premises in question, being upon a consideration other than for cash paid on the purchase, is valid.

6. Whether the said deed is valid, it having no certificate indorsed thereon that it was approved by a master in chancery.

7. Whether Thomas B. Clarke, having previously mortgaged the premises in fee to Henry Simmons, had competent authority to sell and convey the same to De Grasse.

8. Whether the subsequent conveyance of the premises, as set forth in the case, made by George De Grasse, rendered the title of such grantee, or his assigns, valid against the plaintiffs.

It is thereupon, on motion of the plaintiffs by their counsel, ordered that a certificate of division of opinion, upon the foregoing points, which are here stated during this same term, under the direction of the said judges, be duly certified under the seal of this court to the Supreme Court of the United States, to be finally decided.

Our first observation upon the act of April, 1814, is, that the first section of it gives to the Chancellor the power to appoint trustees, in the place of those named in the will. This is to be done upon the petition of Thomas B. Clarke, as contradistinguished from a suit by bill for such a purpose; and as occasion may require, the Chancellor may substitute and appoint other trustees, in the room of these appointed under the act, in like manner as is practiced in chancery, in cases of trustees appointed therein. By the last section of the act, the trustees are said to be liable in all respects to the power and authority of the Court of Chancery, concerning the trusts created by the act.

It will be conceded by all, that the Court of Chancery, without this act, had not the power, under its inherent or original jurisdiction, to change the trustees summarily upon petition, or except by means of a bill filed by and against all proper parties, for such causes as trustees may be removed in chancery.

The second, third, fourth, fifth, and sixth sections of the act, except the last clause in the sixth already cited, prescribe minutely what may be done by the trustees who might be appointed by the Chancellor, in relation to the land devised, leaving nothing to be done by the court, except in its supervisory power over the acts of the trustees.

Under this act, it does not appear that any application was made for the substitution of trustees in place of those named in the will. The latter continued in their testamentary relation to the land devised, until after the act of March, 1815, had been passed.

That act was passed upon the petition of Thomas B. Clarke.

He recites a release to him by Clement C. Moore of his contingent interest in the estate devised, whereby he says himself and his infant children have become the only persons interested in the estate. And he declares that he has not been able to prevail upon any suitable person to undertake the performance of the duties enjoined by the first act. He therefore prays for an amendment of it.

Leave was given in the Senate of New York, that such a bill might be reported, and it was passed into an act the 24th of March, 1815.

In the preamble to this act, after reciting Clement C. Moore's release, "whereby the said real estate became exclusively vested in Thomas B. Clarke and his children," it is enacted, that all the beneficial interest and estate of Moore, or those under him, arising by virtue of the act, to which this is a supplement, is vested in Clarke, his heirs and assigns, &c. And that so much of the act as requires the several duties therein enumerated to be performed by trustees, to be appointed by the Court of Chancery, as therein mentioned, be, and the same is hereby, repealed.

The power given by the first act to the court, to appoint trustees, having been repealed, the second section of the second act is,—that Clarke is authorized and empowered to execute and perform every matter and thing, in relation to the real estate mentioned in the act to which this is a supplement, in like manner, and with like effect, that trustees duly appointed under the first act might have done. And Clarke is required to apply the whole interest and income of the property to the maintenance of his family and the education of his children. Then it is enacted, in the third section, that no sale of any part of the estate shall be made by Clarke, until he shall have procured the assent of the Chancellor to such sale; who shall, at the time of giving such assent, also direct the mode in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in Clarke as trustee; and further, that it shall be the duty of Clarke to render an annual account to the Chancellor, or to such person as he may appoint, of the principal of the proceeds of such sale only, the interest being to be applied by said Clarke in such manner as he may think proper, for his own use and benefit, and for the maintenance and education of his children. And if on such return, or at any other time, and in any other manner, the Chancellor shall be of the opinion, that Thomas B. Clarke hath not duly performed the trust by this act reposed in him, he may remove him and appoint another

trustee in his stead, subject to such rules as he may prescribe in the management of the estate hereby vested in Thomas B. Clarke as trustee.

*We have hitherto used the words of the acts. And shall do so, as occasion may require, that Clarke's character under the acts as a trustee, with power as it might be given to him by the Chancellor to sell, may not be misunderstood; and that the special power or jurisdiction given to the Chancellor in the whole matter may be more apparent, when we treat of that part of the case. [*535

The orders given by the Chancellor under the first and supplemental act, upon the petition of Clarke, shall have our attention, after the third act which was passed for Clarke's relief has been noticed.

It was passed upon the memorial of Clarke. It recites, that the Chancellor, under the act for his relief, did order that he might sell the eastern moiety of the property in the act mentioned, but that, owing to the scarcity of money, and low price, no sale could be made, without a great sacrifice. And therefore he prays to be permitted to mortgage the property, as the Chancellor may appoint, for the purposes mentioned in the preceding acts and order of the Chancellor.

The act passed upon this petition is, that he is authorized, under the order heretofore given, or under any order which the Chancellor might give, to mortgage and sell the premises, as trustee under the will of Mary Clarke, and to apply the money to be raised by mortgage or sale to the purposes required or to be required by the Chancellor, under the acts heretofore passed for Clarke's relief.

So much of Clarke's petition to the Legislature has been cited in connection with its acts, to show that the latter were coincident with, and not beyond, the relief for which he asked.

Both fix conclusively that Clarke is to be regarded as the trustee only of the property devised, to sell or mortgage a part of it, with the assent or appointment of the Chancellor. His obligation is to account annually for the principal of the proceeds of every sale or mortgage which might be made, and it is his right to use the interest of the principal for himself and for the education and maintenance of his children. He is called trustee in the acts. In that character, and in no other, is he recognized in the orders of the Chancellor. And, in the last clause of the third section of the second act, it is said another may be appointed in his stead, "subject to such rules as the Chancellor may prescribe, in the management of the estate, hereby vested in the said Thomas B. Clarke as trustee."

His relation to the devised estate was changed by the dis-

charge of the trustees named in the will, but his interest in it
*536] was the same as it had been, with the exception of *Moore's assignment of his contingent remainder, and the power given to the Chancellor to assent to the sale or mortgage of a part of it. The acts of the legislature discharged the trustees named in the devise, whatever may have been their estate in the land under it, but did not vest an estate in fee in Thomas B. Clarke.

We will now precede our inquiry into the jurisdiction given to the Chancellor by the acts, with a few remarks, which will aid in determining the extent of that jurisdiction, and what would have been its rightful exercise.

Jurisdiction in chancery is inherent and original, comprehending now almost every exigency of human disagreement, for which there is not an adequate remedy at law.

Or it is statutory, meaning a new power from legislation for the court to act upon particular subjects of a like kind, as occasions for doing so may occur. Examples of this statutory jurisdiction are the 43d of Elizabeth, called the Statute of Charities. The act known as Sir Samuel Romilly's, giving a summary remedy in cases of breach of trust for charitable uses. And another is the trustee act of Sir Edward Sugden, for amending the laws respecting conveyances and transfers of estate and funds vested in trustees and mortgagees, and for enabling the courts of equity to give effect to their decrees and orders in certain cases.

Or, the jurisdiction in equity is extraordinary, as when a statute permits persons to present petitions to the Chancellor for relief in private affairs, when the petitioner cannot get relief by the ordinary course of law, or from the inherent power of a court of chancery. Cruise, in his Title 33, c. 11, says, they are termed real estate acts, and that it is a conveyance or settlement of lands or hereditaments, made under the immediate sanction of Parliament, in cases where the parties are not capable of substantiating their agreements without the aid of the legislature, and where the carrying such agreements into effect is evidently beneficial to the parties.

In these cases, it must also be recollected that the Chancellor acts summarily, *ex parte*, upon the petition of the party seeking relief. Upon such petitions orders are given, as contradistinguished from decrees in suits by bill filed. The last are his judgments upon the matters in controversy between the parties before the court; the other being orders in conformity with whatever may be the legislative direction and intent in any particular case. Whatever, however, the Chancellor does in either case, he does as a court of chancery. It

will stand as his judgment, when it has been done within the jurisdiction conferred, until it has been set aside upon motion; as his *decrees do, until they have been set [*537 aside by a bill of review.

The acts for the relief of Thomas B. Clarke are of the last kind. They are private acts, relating to a particular estate and persons having interests in it;—one of whom, Clarke, is empowered, as a trustee, to sell a part of it, with the consent of the Chancellor. Several cases of private acts for such relief as was asked by Clarke will be found in the 33 c. of Cruise.

The acts in this case provide that the Chancellor may act upon them summarily, upon the application or petition of Clarke, and in each of them what the Chancellor can do is precisely stated. In such cases, the court will not deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction, and partly upon the statute. In other words, it cannot confound its original jurisdiction in a suit with the powers it may be authorized to execute by petition, either in a public act, giving statutory jurisdiction to the court, to be exercised summarily upon petition, or in a private act providing for relief in a particular case, which is to be carried out by the same mode of procedure.

The legislature of New York, in the exercise of its rightful power to loose a devised estate from fetters put upon it by unforeseen causes, which were defeating the objects of the testatrix, substitutes the Court of Chancery for itself, to give relief to Clarke, to the extent that it is enacted, according to the manner of proceedings in such cases in courts of Chancery. The relief wanted by Clarke was permission to sell or mortgage a part of the estate. Permission to do either, or both, is given by the acts, provided it is done with the assent of the Chancellor.

For the jurisdiction or power of the Chancellor in the matter, we must look to the third section of the act of the 24th March, 1815, and to the act of March 29th, 1816. Both shall be cited in terms. The first is, that no sale of any part of the said estate shall be made by Thomas B. Clarke, until he shall have procured the assent of the Chancellor of this state to such sale; at the time of giving such assent, the Chancellor shall also direct the mode in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in Thomas B. Clarke as trustee. And further, it shall be the duty of the said Thomas B. Clarke annually to render an account to the Chancellor, or to such person as he may appoint, of the principal of the proceeds of such sale only, the

interest being to be applied by Clarke, in such manner as he
*588] may think proper for his use and benefit, and for the maintenance and education of his children. *The act of 1816 is, that Clarke "is authorized, under the order heretofore granted by the Chancellor, or under any subsequent order, either to sell or mortgage the premises, which the Chancellor has permitted or hereafter may permit him to sell, as trustee under the will of Mary Clarke, and to apply the money, so raised by mortgage or sale, to the purposes required, or to be required, by the Chancellor, under the acts heretofore passed, for the relief of the said Thomas B. Clarke."

Such is the jurisdiction of the Chancellor under these acts, in respect to sale, mortgage of the estate, and the proceeds which might be made from either. No authority is given to convey any part or parts of the southern moiety of the said estate in payment and satisfaction of any debt or debts due and owing by Clarke, upon a valuation to be agreed upon between him and his respective creditors. None, that he might receive and take the moneys, arising from the premises, and apply the same to the payment of his debts, investing the surplus only in such manner as he may deem proper to yield an income for the maintenance and support of his family.

This was not an exercise of jurisdiction, but an order out of and beyond it. The jurisdiction given by these acts to the Chancellor is suggested by Blackstone, when he says, "A private act of Parliament for the alienation of an estate is an assurance by matter of record, not depending upon the act or consent of parties themselves. But the sanction of a court of record is called in, to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another." 2 Wend., Bl. Com., 344.

It is not unworthy of remark, that the acts of New York now under consideration were initiated and passed in strict conformity with the mode of legislative proceedings in passing private acts. There were petitions, references to committees, and leave to bring in bills. Nothing was done without the consent of the parties in being capable of consent; and the acts provide for an equivalent in money to be settled upon the infants interested, who had not a capacity to act for themselves, but who were to be concluded by what was directed to be done under the acts. 2 Wend. Bl. Com., 345.

In all this may be seen, too manifestly for any denial of it, the intention of the legislature as to the office of the Chancellor, in the execution of its acts for the relief of Clarke. The Chancellor's office, in respect to the sale of the premises, was to substantiate and preserve a perpetual testimony of the

transfer of the property, as a matter of record, to whoever might be the purchaser of any part of it, in conformity with the way in which a sale of it could be made.

*The beginning and the end of this affair are not unworthy of remark, or of being remembered. The [*589 legislature is first asked to empower the Court of Chancery to appoint trustees, in the place of those named in the will of Mary Clarke, to carry out her beneficent intentions for her grandson and his children. The father, being unable to support himself and his children, asks that a sale might be made of a part of the devised premises, the rents, issues, and profits of which he was entitled to during life. An act is passed, permitting the appointment of trustees, giving a power to sell, and securing to the children an amount from the sales, thought by the legislature to be only an adequate compensation for the sale of land in which they then had a vested estate in remainder, which would become theirs in fee simple absolute upon the death of their father. The next year, the legislature is told that a trustee could not be got. A supplemental act is passed, permitting Clarke himself to do all that trustees could do. Then follows another memorial for another aiding act; to permit Clarke to mortgage the premises, on account of sales not having been made, and because they could not be made for a fair price. Permission is given. After other orders more numerous than the acts under which they were made, an order is given, permitting Clarke, upon an agreed valuation between himself and his creditors, subject to the approval of a master in chancery, to convey the premises to his creditors. Further, that he may apply the money arising from the sales in payment of his debts, and invest the surplus in such manner as he may deem proper, to yield an income for the support of his family. Thus importunity, beginning with an intention to obtain consummate control over a part of the devised premises, triumphs in the privilege given to the children to have any surplus invested for their use, which may remain out of the sales of their estate, after the payment of their father's debts.

The best commentary upon the whole is, that its first result was a conveyance from Clarke to De Grasse, for much of the property, without the master's approval, for worthless wild tax-lands in Pennsylvania or Virginia, for some money lent, and for articles furnished Clarke from De Grasse's oyster house. And De Grasse held on to the conveyance, in defiance of the declaration of the master, that he would not approve the deed for such a consideration.

It is under that conveyance, and another from De Grasse

to him that the present defendant in ejectment claims title to the premises in dispute. Then to give to him any title, either legal or equitable, against the fee simple absolute estate which the children of Thomas B. Clarke have had in the premises since the death of their father.

Whether the order of the Chancellor, permitting Clarke to convey the estate in question in order to apply the money arising from it in payment of his debts, has been considered in the courts of New York, it has been intimated that the act did not give the Chancellor the power to give such an order. Judge Bronson, in *Clarke* v. *Van Surlay*, 15 Wend. (N. Y.) 445, says so. The same may be gathered from the opinion of Chancellor Walworth, in *Cochran* v. *Van Surlay*, 20 Wend. (N. Y.) 364. Mr. Senator Verplanck, in the same case, sitting in the Court for the Correction of Errors, says,—"I have already intimated my strong impression, at least as at present advised, that the orders of the Chancellor were not in conformity with the acts, and that the third act still confined the Chancellor to allow no other application of the proceeds of the sale than was valid under the acts heretofore passed." "The order made under the first two acts was in contravention of the statute so far as it allowed a part of the proceeds of the sale to be applied to the payment of Clarke's former debts. Nor do I think that the words in the act of 1816 ratified the former orders, or extended the Chancellor's powers in future orders, as to the liberty of applying the principal of the funds, of which, according to the acts heretofore on this subject, the interest only was to be expended." In this point, then, this court, in the opinion it now expresses, will not differ from the courts in New York.

But we do differ with the learned judges and senator upon another point, common to the case before us and those cases in which they expressed their opinions. Our conclusion, however, contrary to theirs, will be put upon grounds not suggested when they acted on those cases. Indeed, our point of difference is not concerning a principle or rule in chancery; but as to the application of the rule in *Cochran* v. *Van Surlay*. It was said in that case, and it was the foundation of the judgment in it, that a decree in chancery could not be looked into in a collateral way for the purpose of setting aside rights growing out of it. We concur, that neither orders nor decrees in chancery can be reviewed as a whole in a collateral way. But it is an equally well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before

the latter, by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common *law, or whether the point ruled has [*541 arisen under the laws of nations, the practice in chancery, or the municipal laws of states.

This court applied it as early as the year 1794, in the case of *Glass et al.* v. *Sloop Betsey*, 3 Dall., 7. Again, in 1808, in the case of *Rose* v. *Himely*, 4 Cranch, 241. Afterwards, in 1828, in *Elliott* v. *Piersol*, a case of ejectment, 1 Pet., 328, 340. This is the language of the court in that case,—not stronger though, than it was in the preceding cases:—"It is argued that the Circuit Court of the United States had no authority to question the jurisdiction of the county court of Woodford county, and that its proceedings were conclusive upon the matter, whether erroneous or not. We agree, if the county court had jurisdiction, its decision would be conclusive. But we cannot yield assent to the proposition, that the jurisdiction of the county court could not be questioned, when its proceedings were brought collaterally before the Circuit Court. Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are nullities; they are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them; they constitute no justification, and all persons concerned in executing such judgments, or sentences, are considered in law as trespassers."

This distinction runs through all the cases on the subject.

This court announce the same principle in *Wilcox* v. *Jackson*, 13 Pet., 499, and twice since in the second and third volumes of Howard's Supreme Court Reports. *Shriver's Lessee* v. *Lynn et al.*, 2 How., 59; *Lessee of Hickey* v. *Stewart et al.*, 3 Id., 750.

In the case in 3 Howard, the defendant in ejectment wished to protect himself by a record in a prior chancery suit between himself and the plaintiff, in which a decree had been made in favor of the former, upon which the chancery court had issued a *habere facias possessionem*, to put him in possession of the land. The record in the Circuit Court was admitted as evidence, the plaintiff objecting, and the court gave judgment for the defendant in ejectment. The case was brought here upon a writ of error. And this court said, that as the defendant claimed property on the premises in dispute under the

record from the Court of Chancery, it would inquire collaterally into the jurisdiction of that court to try the question of title. And it ruled that the court had no jurisdiction *542] for such a purpose; *that the Circuit Court erred in permitting the record to be read to the jury as evidence in behalf of the defendant, and reversed the judgment.

The point in *Cochran* v. *Van Surlay* and in this case is, whether the Chancellor did or did not, in a case for which he had jurisdiction for certain purposes, exceed the jurisdiction given to him for the special purposes of the case. Jurisdiction may be in the court over the cause, but there may be an excess of jurisdiction asserted in its judgment. That was *Shriver's case*, in 2 How.

Then the point of inquiry now is, exactly that which the judges in the cases in 15 and 20 Wend. (N. Y.), admitted to be a very doubtful exercise of power by the Chancellor. That is, whether the order permitting Clarke to convey the property to his creditors, at a valuation to be agreed upon between them, and to apply the proceeds of sales and mortgages to the payment of his debts, was an order within the power given to him by the acts. Judge Bronson will not admit it. Chancellor Walworth puts it hypothetically,—if the Chancellor has not exceeded his jurisdiction, but has merely erred upon the question whether such a sale as he ordered would eventually be for the benefit of the infants, Justice Bronson was clearly right in supposing that the decision of the Court of Chancery could not be reviewed in this collateral way. Mr. Senator Verplanck says that the order under the first two acts *was in* contravention of the statutes, nor does he think that the act of 1816 extended the Chancellor's power as to the proceeds.

Upon the point of looking into the jurisdiction of a court collaterally, when a right of property is claimed under its proceedings, we must add, that it prevails in New York just as it does in the courts of England and in the courts of the United States. In *Latham* v. *Edgerton*, 9 Cow. (N. Y.), 227, it is said,—"The principle that a record cannot be impeached by pleading is not applicable when there is a want of jurisdiction. The want of it makes a record utterly void and unavailable for any purpose. The want of jurisdiction is a matter that may always be set up against a judgment when it is to be enforced, or when any benefit is claimed under it." See also, to the same point, *Fenton* v. *Garlick*, 8 Johns. (N. Y.), 194; *Kilbourne* v. *Woodworth*, 5 Id., 37; 19 Id., 39; 6 Wend. (N. Y.), 446. And in the case of *Rogers* v. *Diel*, 6 Hill (N. Y.), 415,—a case of ejectment,—the chief justice ruled that the power of a court of chancery to order the

real estate of an infant is derived entirely from the statute. Thus sustaining an objection collaterally to proceedings and a decree in chancery which were regular in *form, [*548 but void in fact, on account of the Chancellor's not having jurisdiction or authority to make such a decree.

The operation of every judgment depends upon the jurisdiction of the court to render it. Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceeded in the judgment. And whenever the right to property is claimed to have been changed under a judgment or decree by a court, and it is set up as a defence in another court, the jurisdiction of the former may be inquired into. The rule is, that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal. *Attorney-General* v. *Lord Hotham*, Turn. & Russ., 219.

And such is the rule in New York, as has been shown by the citation of cases from the reports of that state. But it has been argued, that the rule will not apply in the cases now in hand, because it has been decided by the highest tribunal in New York, that the Chancellor had jurisdiction, under the acts for the relief of Clarke, to give the order permitting him to sell the property to his creditors in payment of his debts.

It is difficult for us to admit that the cases of *Clarke* v. *Van Surlay*, in 15 Wend., and *Cochran* v. *Van Surlay*, in 20 Id., were meant to decide that point, when each judge whose opinion has been reported in those cases expresses an opinion amounting almost to a denial that the Chancellor had jurisdiction to order or permit a sale in payment of Clarke's debts. But admit that the New York cases are otherwise, we cannot admit that the rule hitherto observed in the court, of recognizing the judicial decisions of the highest courts of the states upon state statutes relative to real property as a part of local law, comprehends private statutes or statutes giving special jurisdiction to a state court for the alienation of private estates. It has never been extended to private acts relating to particular persons, for the reason, that, whatever a court in a state may do in such a case, its decision is no part of local law. It concerns only those for whose benefit such a law was passed, and because the decision under it is no rule for any other future case. It may from analogy be cited for the interpretation of another private law of a like kind, but then the utmost extension of it would be, that there would be two

[illegible]

[illegible] arguments in the private cases which may show more plainly what points are intended to be [illegible].

The case presented to us is [illegible] of the points certified, as follows. The state of New York passed certain acts for the relief of Thomas B. Clarke in relation to a devise of [illegible] and directed that the acts shall be carried into execution by the Chancellor of the state. In the course of the proceedings for that purpose he orders that the trustee, Clarke may sell in fee such particular portions of the land, and convey the same if it is in payment of any debt at such a value as to be agreed on between himself and his creditors and that Clarke may apply the proceeds of sale to the payment of his debts.

The defendant in this action says he bought from De Grasse. It is proved that De Grasse was a creditor of Clarke, and that the consideration for Clarke's conveyance to him, except the [illegible] was the amount that Clarke owed to him. Then, in order to sustain Clarke's conveyance to De Grasse, he introduces the acts for the relief of Clarke, and the orders of the Chancellor upon them.

This evidence raises the question, whether or not the Chancellor had jurisdiction to give an order, permitting Clarke to convey any part of the property in payment of a debt. After the most careful perusal of the acts and orders, we have concluded that the Chancellor had not the jurisdiction to give an order, permitting Clarke to convey any part of the devised premises in satisfaction of his debts, and that neither De Grasse nor his alienee, Berry, can derive from the order, or the conveyance by Clarke to De Grasse, any title to the premises in dispute. This conclusion substantially answers the first four points certified; but answers will be given in more precise form hereafter.

We now proceed to the other points certified.

Upon the first of them, relating to the premises having been parted with by Clarke to De Grasse, upon a consideration other than cash, we remark that *sale* is a word of precise legal import, both at law and in equity. It means at all times, a contract between parties, to give and to pass rights of property for money,—which the buyer pays or promises to pay to the seller for the thing bought and sold. Noy's Max., ch. 42; Shep. Touch., 244. No departure from the manner in which a sale is directed to be made, either under a judgment at law or a decree in equity, is permitted.

In the acts for the relief of Clarke, *sale* is the word used and frequently repeated. No other term, in reference to the power given to sell a part of the devised premises, is used.

The Chancellor's order is, that Clarke is permitted to sell. No words are used in the acts to qualify the term *sale*. There is not anything to raise a presumption, that Clarke was permitted to sell for anything else than cash. Even the [*545 debts of Clarke, *which the Chancellor thought he had the jurisdiction to order the payment of, are directed to be paid out of the proceeds of the sale.

We think, therefore, that the deed executed by Clarke to De Grasse, being upon a consideration other than for cash, is not valid to pass the premises in dispute to De Grasse, or to his alienees.

Another point certified is whether Clarke, having previously mortgaged the premises in fee to Henry Simmons, had competent authority to sell and convey the same to De Grasse. If Clarke could not convey the premises for which he was the trustee to a creditor in payment of a debt due when the order of the Chancellor was given, his having united with the master in chancery in mortgaging the premises in fee to Simmons, as a security for a debt, could not, from any transfer of it by the mortgagee, alter its character as a security for a debt, so as to permit the assignee, who by taking an assignment of the mortgage became a creditor, or any other person who became his assignee, to receive from Clarke, a conveyance of the premises in discharge of the mortgage. Simmons was a creditor of Clarke. The assignee of his claim could only be a creditor in his place, having no other right to be paid by a conveyance of the premises, than the original creditor had. But in truth the mortgage was discharged, and being so, Clarke was replaced in his trustee relation to the premises, precisely as he stood before the mortgage was made. He could not then, because the land had been mortgaged in fee to Simmons, have any authority to sell and convey the premises to De Grasse, for the consideration of the debt due by him to De Grasse. But if by the question it was meant that, because Clarke had mortgaged to Simmons, he could not mortgage or sell again after a release from the mortgagee, then we conclude that Clarke's having previously mortgaged the premises in fee to Simmons, did not prevent him, after a release from the mortgagee, from selling and mortgaging the premises again, provided the same was not done in payment of a debt, or as security for a debt.

The eighth point may be dismissed with two observations. If the conveyance from Clarke to De Grasse did not give to him a title, and we have said it did not, De Grasse could not convey a title in the premises to a third person, though value was received by him from the latter. Besides, in this case,

the paper under which De Grasse claims has recitals in it, which would exclude any person buying from him from saying that he had not notice enough to put him upon an inquiry into the title of De Grasse.

*546] *We are now brought to the consideration of the point, whether the deed to De Grasse is valid, it having no certificate indorsed upon it that it was approved by a master in chancery. It involves what has been the practice in courts of equity, which, from long standing, habitual use, and uniform judicial acquiescence, has become law,—law in England, law in New York, law for the courts of equity of the United States, and law in every State of the Union, except as it may have been modified by the legislation of the states.

The usual mode of selling property under a decree or order in chancery is a direction that it shall be sold with the approbation of a master in chancery, to whom the execution of the decree in that particular has been confided. It matters not whether the sale is public or private by a person authorized to make it. Not that the approbation of the master in either case completes a title to a purchaser. It is only the master's approval of the sale, and is one step towards a purchaser's getting a title. Before, however, a purchaser can get a title, he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been made either privately or at auction. That report then becomes the basis of a motion to the court, by the purchaser, that his purchase may be confirmed. Notice of the motion is given to the solicitors in the cause, and confirmation *nisi* is ordered by the court,—to become absolute in a time stated, unless cause is shown against it. Then, unless the purchaser calls for an investigation of the title by the master, it is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree for sale, his approval of it, and the confirmation by the court of the sale, in the manner that such confirmation has been ordered.[1]

We have been thus particular, for the purpose of showing the offices of the master in relation to a sale, and what is meant by subjecting a sale to the approval of a master, and to show that such a sale, until approved by the master and confirmed by the court, gives no title to a purchaser of an estate, which he may have bargained to buy. We do not mean to say, that such cautionary proceedings upon sales under decrees and orders in chancery may not be dispensed with, by a special

[1] CITED. *Smith* v. *Wert*, 64 Ala., 89.

order of the Chancellor to pretermit them; but that such are the proceedings, when no special order has been given. Nor do we mean to have it implied that a special order for the master's approval of the sale was not given in this case.

The proviso in the order of the 15th March, 1817, is,—"Provided, nevertheless, that every sale, and mortgage, and conveyance *in satisfaction, that may be made by [*547 the said Thomas B. Clarke in virtue hereof, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage which shall be made in the premises."

Our interpretation of the order is, that the approval of the master, and the certificate of it, are not confined to a conveyance in satisfaction of debt, but that the Chancellor meant that the approval and certificate should be given and be indorsed upon every deed of sale and mortgage, as well as upon conveyances in satisfaction of debts.

It was also argued, that the sale to De Grasse was a judicial sale. Unless a legal term of definite and unmistakable certainty in all the past application of it shall be made to comprehend a transaction which it has never included before, the sale by Clarke to De Grasse was not a judicial sale. By judicial sale is meant one made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell.[1]

The sale by Clarke to De Grasse was an attempt by both of them to evade the order of the Chancellor, that every sale, &c., made by Clarke, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises. And in no event could a sale by Clarke, in conformity with the order, have been a judicial sale, but simply a sale by a private individual authorized to make it under acts passed for his relief, and assented to by the Chancellor, for the purpose of ultimately substantiating and verifying by a court of record the transfer of the property. It was a sale made without process, not by an officer in any sense of the word, but by a private person to a private person, after negotiation between them, and done by one of them, who had only in a particular way the assent of the Chancellor to sell.

Now if, in the instance of Clarke's conveyance to De Grasse, none of the usual cautions have been taken by the latter to make the conveyance complete,—which, for the sake of the present point, we are only supposing might have been done,

[1] Quoted. *Lawson* v. *De Bolt*, 78 Ind., 564.

subject to our conclusion that Clarke could not have conveyed the premises to him as a creditor—whose fault is it that they were not taken? and how much more is De Grasse's fault aggravated from the testimony in the cause, which proves that he was told by the master, Mr. Hamilton, from the start of his buying or meaning to buy from Clarke, that he would not ever approve the sale and make such a certificate of it upon the paper given to him by Clarke upon such a consideration for the property?

We find the answer to our inquiries in the long experience and practice in chancery. In any sale under a decree or order in chancery, the purchaser, before he pays his money, must not only satisfy himself that the title to the property to be sold is good, but he must take care that the sale has been made according to the decree or order. *Coleman* v. *Sterne*, 3 Bligh, 161: *Lemaire* v. *Wingfield*, 2 Bro. C. C. 251. If he takes a title under an imperfect sale, he must abide the consequence.

In this instance, there was a perverse disregard by De Grasse of the order of the Chancellor and the caution of the master. His conduct puts it out of his power, or any one claiming under him, to complain, if Clarke's conveyance shall be declared to be invalid, on account of the master's disapproval of the sale and his refusal to put a certificate of approval of it upon the deed to De Grasse.

Mr. Hamilton, the master's testimony in the case is, that Clarke and De Grasse came to him to approve the deed which it is his impression had been filled up by Clarke, and that, upon ascertaining from them the consideration, he refused to do so. The deed, too, recites a consideration of two thousand dollars, and it is proved that the consideration was, in fact, wild worthless tax-lands in Virginia or Pennsylvania, an account for articles furnished to Clarke by De Grasse, and some items of money lent. The witness says, both Clarke and De Grasse came together more than once to his office on the subject, and that he was besought by them frequently to approve the deed; that he would not do so. It is the case of an anxious creditor, holding on to what he could get from an insolvent and prodigal debtor, in spite of what he knew to be the only terms upon which the debtor could convey.

We think that the sale by Clarke was a nullity without such approval by the master, to whom the execution of the order was confided by the Chancellor. "Looking merely to the parties, it is a nullity, because it wants the assent of the Chancellor, through the officer whom he substitutes for himself to give it. Looking to the conveyance, it is void for the want of

the performance of that condition precedent which was made essential, not merely to the commencement of the estate, but to the very creation of the power of sale."

It is under that conveyance, and another from De Grasse to him, that the defendant in ejectment claims title to the premises in dispute. They do not give to him any title, either legal or equitable.

*We answer, then, to the points certified to this court for its decision:— [*549

To the first point, we rule, that the act of the Legislature, stated in the case, divested the estate of the trustees under the devise in the will of Mary Clarke, but did not vest the whole estate in fee, or any part of it, in Thomas B. Clarke.

To the second point, we rule, that the authority given by the said acts to the trustee to sell, was a special power, to be strictly pursued, and that the trustee was not vested with an absolute power of alienation, but only with the power to sell with the assent of the Chancellor, subject, in all that the trustee might do, by way of sale or otherwise, concerning the premises, to re-examination and account in equity.

To the third point, we rule, that so much of the order set forth in the case, as having been made by the Chancellor, which permitted Thomas B. Clarke to convey any part or parts of the southern moiety of the estate, or any other part of the estate, in payment and satisfaction of any debt or debts due and owing from Thomas B. Clarke, upon a valuation to be agreed between himself and his respective creditors, provided, nevertheless, that every sale, and mortgage, and conveyance in satisfaction, that may be made by the said Thomas B. Clarke, in virtue hereof, shall be approved by one of the masters of the court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises, or which authorized Thomas B. Clarke to receive and take the moneys arising from the premises and apply the same to the payment of his debts, and to invest the surplus in such manner as he may deem proper to yield an income for the maintenance and support of his family,—was not authorized or in conformity to the acts of the Legislature, as they are set forth in the record. That these orders, however, are to be regarded as the acts of a court of chancery, exercising a special jurisdiction under private acts, which did not give to the Chancellor jurisdiction to pass the orders as they have been stated in this answer to the third point.

To the fourth point, we rule, that the Chancellor had authority under the acts to assent to sales and conveyances

of the estate by the trustee; but not to any sale or conveyance, on any other consideration than for cash paid on said conveyance.

To the fifth point, we rule, that the deed executed by Thomas B. Clarke to George De Grasse, for the premises in question, is not valid, it having been made for a consideration other than for cash paid on the purchase.

To the sixth point, we rule, that, if the deed to De Grasse *550] *had been otherwise valid, which we have said was not, it would not be valid without having a certificate endorsed thereon, that it was approved by Mr. Hamilton, the master in chancery, to whom the execution of the order was confided by the Chancellor.

To the seventh point, we rule, that the mortgage in fee of the premises by Clarke to Simmons, did not so exhaust the power as trustee, that he might not, after a release from the mortgagee, sell or mortgage the property again; but it was not in the trustee's power to sell to De Grasse for a debt.

To the eighth point, we rule, that the subsequent conveyance of the premises, as set forth in the case, made by George De Grasse, would not give to his grantee, or the grantee's assigns, a valid title against the plaintiffs in ejectment.

Mr. Chief Justice TANEY dissented from the opinion of the court in this case, and also in the subsequent cases of *Williamson and Wife* v. *The Irish Presbyterian Congregation of New York*, and of *Charles A. Williamson and Wife, Rupert J. Cochran and Wife*, and *Bayard Clarke*, v. *George Ball;* and concurred with Mr. Justice NELSON.

Mr. Justice CATRON also dissented in the above enumerated cases, and concurred with the opinion of Mr. Justice NELSON.

Mr. Justice NELSON.

I am unable to concur in the judgment of a majority of the court in this case, and shall, therefore, proceed to state the grounds of that dissent, with as much brevity as the nature and importance of the questions involved will admit.

I shall confine the examination to those grounds which I regard as decisive in the determination of these questions, without stopping to discuss several other points made upon the argument, and which have a more remote bearing upon the case.

The will of Mary Clarke, made and published April 6th, 1802, lies at the foundation of this controversy; and it is necessary, therefore, to recur for a moment to its provisions.

She devised to three trustees and their heirs, a part of her farm at Greenwich, called Chelsea, then situate in the vicinity of the city of New York, now a part of it, embracing some forty acres of land, together with a dwelling-house in town, in trust, to receive the rents and profits, and pay the same to Thomas B. Clarke, a grandson, during his life; and after his decease, to convey the estate to his children living at his death; and if he should leave no children, then, in trust, to convey the same to Clement C. Moore, and his heirs.

*Thomas B. Clarke, the tenant for life, was married in 1802, and in 1814 had a family of six children, the [*551 eldest eleven years of age; and on the 2d of March of that year, applied to the Legislature of New York for relief on the ground that the property devised was, in its then condition, nearly unproductive, and incapable of being improved so as to yield an adequate income for the maintenance and support of himself and family.

The trustees, and C. C. Moore joined in the application.

On the 1st of April, 1814, an act was passed for his relief, authorizing the Court of Chancery to appoint trustees in the place of those named in the will, and providing for a sale of a moiety of the estate by the trustees, under the direction of the Chancellor; the proceeds to be invested in stocks or real security, upon the trusts in the will, and the income to be applied to the maintenance and support of the family of Clarke, and the education of his children. Nothing was done under this act.

On the 21st of February, 1815, Clement C. Moore, the ultimate remainder-man under the will, released and quit-claimed all his interest in the estate to Clarke; and on a second application to the Legislature for relief, a supplemental act was passed, on the 24th of March, 1815, reciting in the preamble the release, and substituting Clarke as the trustee of the estate in place of those provided for in the previous act; and authorizing a sale by the trustee of a moiety of the estate, with the assent of the Chancellor, and providing for the investment of so much of the proceeds in Clarke, as trustee, as the Chancellor should direct; the income of the investment to be applied to the maintenance and support of the family, as in the previous act.

On an application to the Chancellor, under this and the previous act, on the 28th of June, 1815, an order of reference to one of the masters in chancery was made, directing him to inquire into the debts of Clarke, distinguishing between those contracted for the maintenance of his family and the education of his children; and into the then condition of the estate

devised under the will and the means possessed by Clarke to maintain and support his family, other than from the rents and profits of the estate. Which report was made accordingly. And on the coming in and filing of the same, the Chancellor, on the 5th of July, ordered a sale of a moiety of the estate, together with the house and lot in town; and that so much of the proceeds as might be necessary for the purpose be applied under the direction of one of the masters of the court, to the payment and discharge of the debts then owing by Clarke, and to be contracted for the necessary purposes of the family, to be ascertained before the said masters; and the residue to be invested and the income applied as therein provided by the order.

Nothing was done under this order except the sale of a few lots, the sales having been superseded by the master for want of bidders, at the request of the trustee, to prevent the sacrifice of the property. And on application to the Legislature another act was passed on the 29th of March, 1816, authorizing Clarke, as trustee, under the order already granted by the Chancellor, or any subsequent orders that might be granted either to mortgage or sell the premises which the Chancellor had permitted, or might permit him to sell; and to apply the proceeds to the purposes required, or that might be required, by the Chancellor, under the previous acts of the legislature.

On the 15th of March, 1816, on an application, the Chancellor ordered that Clarke be authorized to mortgage or sell the moiety of the estate, as provided for in the several acts, as might be deemed most beneficial to all parties concerned; and also to convey any part of it in payment and satisfaction of any debt owing by him, upon a valuation to be agreed on between him and his creditors, provided that every sale, and mortgage, and conveyance in satisfaction, that may be made by him, shall be approved by one of the masters of the court; and that the certificate of such approval be indorsed on such deed or mortgage that may be made in the premises. And further, that he apply the proceeds to the payment of his debts, and invest the surplus in such manner as he may deem proper to yield an income for the support and maintenance of his family.

On the 2d of August, 1821, Clarke, under this order of the court, sold and conveyed the lot in question, among others, to George De Grasse, for the consideration on the face of the deed of $2,000. No approval of the master appeared to have been indorsed on the deed.

The defendant holds through intermediate conveyances from De Grasse, and is admitted to be a *bonâ fide* purchaser.

I have thus stated the material facts out of which the important questions involved in this case arise: and I have done so for the reason, that, in my judgment, the statement itself presents a history of legislative and judicial proceedings, which demonstrate that the legal title to the premises in controversy is in the defendant, upon well established principles of law,—a title derived under a judicial sale, made in pursuance of an order or judgment of one of the highest courts in a state, in the exercise of its general jurisdiction.

This plain proposition is manifest on the face of the record. Every order made by Chancellor Kent was made in his court according to the established forms of proceeding, and rules of the court.

*The Chancellor had previously determined, (*In the Matter of Bostwick*, 4 Johns. (N. Y.) Ch., 100,) that a [*553 proceeding of this character could be properly instituted by petition instead of by bill, as he found it to be in conformity with the established practice of the Court of Chancery in England.

The practice there had not been uniform, depending somewhat upon the amount of the estate; and a distinction had been made, at one time, between real and personal estate; but the later authorities had generally concurred in allowing the institution of the proceeding by petition. (2 Story Eq., § 1354, p. 582, and cases there referred to; Macpherson on Infants, ch. 22, § 1, and cases.)

In every instance, the application took the usual course of a reference to one of the masters of the court, directing him to inquire into the truth of the allegations in the petition, and report thereon; and upon the coming in and filing of the report, the order was entered.

All the powers and machinery of the court were used in conducting the proceedings; and which, while they facilitate the orderly despatch of business, at the same time enable the parties to present their case in the fullest and most authentic form, for the judgment of the court.

Even if a bill had been filed in this case,—and we have seen that it might have been, in which event, it would hardly have been pretended the order or decree of the court could have been questioned collaterally,—the forms of the proceeding could not have been more strictly observed. Indeed, the petition in the particular case is nothing more than a substitute for the bill, as affording a more speedy and economical mode of instituting the proceedings.

[illegible] was supposed that a bill was indispensable, [illegible] 2 Sch. & Lef. 2 Ball & B. 2 § 2 Vice C. as it still is in England where the estate of the minor is large, or it is [illegible] in the Court. 2 Ves. 444: Macpherson on Infants, p. 514 and note.

Any party interested in the order had a right to appeal from the decision of the Chancellor to the Court for the Correction of Errors. An appeal may be taken from an interlocutory, as well as final decree, according to the laws and practice in New York.

That an appeal might have been taken in the case is the established practice, and will be disputed by no lawyer there; and while it had been, it would seem to be decisive of the nature and character of the jurisdiction exercised by the Chancellor.

Being, therefore, a judicial sale under the judgment of [illegible] one of the highest courts of the state, the principle is fundamental, that the regularity of the proceedings cannot be inquired into in this collateral way.

The general impression of all the cases on this head, says Lord Redesdale, is that the purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of the parties, and that it has on investigation properly decreed a sale (1 Sch. & L. 597.) And says Mr. Justice Thompson, in delivering the opinion of this court, in *Thompson* v. *Tolmie*, 2 Pet. 163.—"If the purchaser was responsible for the mistakes of the court in point of fact, after it had adjudicated upon the facts, and acted upon them, these sales would be snares for honest men. The purchaser is not bound to look farther back than the order of the court. He is not to see whether the court was mistaken in the facts."

The defendant in that case held the title under a judicial sale, ordered by the court in a case of partition, where the commissioners had reported that partition could not be made without loss. The suit was brought by the heirs, who set up, as invalidating the title of the defendant, that neither of the children of the intestate was of age at the time of the sale. The statute expressly forbade it, until the eldest became of age. The other ground was, that the sale had been confirmed only conditionally. The court held the parties concluded by the order and sale.

I shall not pursue the examination of this branch of the case farther, as the principle upon which it rests has become incorporated into the very elements of the law. I have referred to these two cases, simply to illustrate the strength

and force of the principle, in protecting the title of a *bona fide* purchaser, standing in the relation of the present defendant.

But it has been argued, that Chancellor Kent, while sitting in his court, administering the law under these acts of the Legislature of New York, has misconstrued or misapprehended the nature of his jurisdiction; and that, instead of sitting as a court, he was acting in the subordinate character of a commissioner, or as an individual outside of his court; that it was an extraordinary power, conferred upon him by a special statute, prescribing the course of proceeding; and that any departure therefrom, or error in the proceedings, rendered the order null and void, and of course all acts done under it.

It was even intimated, though not argued, that the statutes themselves were unconstitutional; that it was not competent for the Legislature to authorize the sale of the real estate of infants for their maintenance and support, or for their education or advancement in life.

*We suppose this power will be found to exist in every civilized government, that acknowledges a superintending and protecting power over those of its citizens or subjects who are disabled through infancy or infirmity from taking care of themselves; and that, where they possess the means of themselves, they will be applied, under the direction of the proper authority, to their support and nourishment. [*555

No one doubts the power of the government to take the property of the citizen to support the paupers of the state; and, surely, it can hardly be regarded as a very great stretch of power to provide for the application of it to the maintenance and support of the owner or proprietor himself or even to the support of the members of the same family.

But I shall not go into this question; for whatever may be the objections to the exercise of the legislative powers, we are not aware of any on the ground of repugnancy to the Constitution of the United States, or, if made, that there is any foundation for it; and as to the state of New York, where the question alone must be determined, no doubt is entertained there in respect to it, by any department of the government.

But to recur to the jurisdiction of the Chancellor.

The Court of Chancery possesses an inherent jurisdiction, which extends to the care of the persons of infants so far as is necessary for their protection and education; and also to the care of their property, real and personal, for its due management, and preservation, and proper application for their maintenance.

The court is the general guardian, and, on the institution of

proceedings therein involving rights of persons or property concerning them, they are regarded as wards of the court, and as under its special guardianship and protection: and no act can be done affecting either person or property, or the condition of infants, except under the express or implied direction of the court itself, and every act done without such direction is treated as a violation of the authority of the court, and the offending party deemed guilty of a contempt, and treated accordingly. (2 Story Eq., §§ 1341, 1352, 1353; 3 Johns. Ch. (N. Y.), 49; 4 Id., 273; 2 Id., 542; 6 Paige (N. Y.), 291, 366; 19 Ves., 52; Macpherson on the Law of Infants, p. 193, Appx. 1; *Hughes* v. *Stevens*, 3 Atk., 601, S. C.)

If the father is not able to maintain his children, the court will order maintenance out of their own estate; and the inability need not depend upon the insolvency, but inability, from limited means, to give the child an education suitable to the fortune possessed or expected (*Buckworth* v. *Buckworth*, 1 Cox, 80; *Jervoise* v. *Silk*, Coop., 52.) The allowance will be made, although the devise or settlement under which the property is held contains no direction for maintenance (Ib.), but even directs the income to accumulate. (5 Ves. 194, 195, n. 197, note; 10 Id., 44; 4 Sim., 132; Macpherson, ch. 21, § 2, p. 223.)

*556]

It is also settled, that where there are legacies to a class of children, for whom it would be beneficial that maintenance should be allowed, though the will does not authorize it, but directs an accumulation of the income, and the principal, with the accumulation, to be paid over at twenty-one, with survivorship in case any should die under age, the court will direct maintenance (11 Ves., 606; 12 Id., 204; 2 Swanst., 436); but if there is a gift over, it will not be allowed without the consent of the ultimate devisee. (14 Ves., 202; 5 Id., 195, *n.*; Ward on Legacies, 303; Macpherson, pp., 232, 233, 234.)

So the court will break in upon the principal, where the income is insufficient for maintenance and education (1 Jac. & W., 253; 1 Russ & M., 575, 499); and will break in upon it for past payments (2 Vern., 137; 2 P. Wms., 23); and where the father is unable to maintain his children, and has contracted debts for this purpose, or for their education, the court will direct a reimbursement out of the children's estate (6 Ves., 424, 454; 1 Bro. C. C., 387; Macpherson, sec. 9, p. 246); and will, if the father or mother is in narrow circumstances, in fixing the allowance, have regard to them, increasing it for the benefit of the family. (1 Ves., 160; 2 Bro. C. C., 231; 1 Beav., 202; 1 Cox, 179.)

The management and disposition of the estates of infants, which I have thus referred to and briefly stated, with the authorities, are among the mass of powers upon this subject which belong to the original and inherent jurisdiction of the Court of Chancery. They relate to their personal, and the income of their real, estate, the court having no inherent power to direct a sale of the latter for their maintenance or education; that power rests with the legislature. It will be seen, therefore, that the only additional authority conferred upon the Chancellor, by the acts of the legislature in question, was the power to direct the sale of the real estate,—to convert it into personalty for the purposes mentioned. It was but an enlargement, in this respect, of the existing jurisdiction of the court; placing the real estate, for the purpose of maintenance and education, upon the same footing as the personalty. With this exception, every power conferred or exercised under the acts in question, in the management and application of the fund, as we have seen, belonged inherently to its general jurisdiction; and its exercise in the particular case was as essential for the proper management and preservation, *and application, as in any other that might come before the court. [*557

We can hardly suppose that it was the intention of the legislature to confer authority upon the Chancellor in one capacity to sell, and in another to manage and apply the proceeds for the benefit of the children. And yet such must be the conclusion, unless we suppose it was intended that the fund itself should be administered out of court, and under the direction of the Chancellor as a commissioner.

I must be permitted, therefore, to think, that Chancellor Kent, familiar to his mind as were the powers and duties belonging to his court over the estates of infants, as well as in respect to every other branch of equity jurisprudence, did not mistake or misapprehend the nature of the powers and duties enjoined upon him under the acts in question. And that he might well conclude, that the authority to sell the real estate of the children, for their maintenance and education, was but an enlargement of his general jurisdiction in the management and disposition of their property for the purposes mentioned. Indeed, the very objects of the sale pointed directly to this jurisdiction. How apply the fund for maintenance and education,—as commissioner, or chancellor? Certainly, he could not doubt as to the intent or objects of the acts in this respect. It was a fund to be brought into the court, and the children were to become wards of the court, to be cherished, and protected by its powers.

In addition to the judgment of Chancellor Kent himself, we have also the judgments of the two highest courts in New York, in the case of *Clarke* v. *Van Surlay*, 15 Wend. (N. Y.), 436, and *Cochran* v. *The Same*, 20 Id., 365, S. C.

That was a suit involving the same title, brought by one of the heirs of Thomas B. Clarke, and depending upon the same evidence. It was first decided in the Supreme Court of that state in 1836, and in the Court for the Correction of Errors in 1838.

It was determined by both courts, that the title of the purchaser was valid, on the ground, that he held under a judicial sale directed by the Chancellor in the exercise of his general jurisdiction; and that, having jurisdiction of the subject-matters, if any error was committed, either in his construction of the acts of the legislature or in the application of the funds, it was not inquirable into in a court of law. The order was conclusive, till set aside, upon all the parties.

No member of either court that expressed an opinion entertained a doubt about the nature of the jurisdiction.
*558] The judgment *had the concurrence of Chancellor Walworth, his learned successor, who has presided in that court with distinguished ability for the last twenty years, and is familiar with its organization and powers. If it is possible, therefore, for a judicial question involving the construction of state laws to be settled by learning or authority in its own courts, it would seem that the one before us has been.

But there is another view of this branch of the case, which, in my judgment, is equally decisive of the question; and much more important, on account of the principle involved. Where are we to look, for the purpose of ascertaining the jurisdiction of the Court of Chancery of the state of New York? To the judgment of this court, or to the laws and the decisions of the courts of the state?

It should be recollected, that, in the trial of titles to real property held or claimed under the laws of the state, the Federal courts sitting in the state are administering those laws, the same as the state courts, and can administer no other. They are obliged to adopt the local law, not only because the titles are founded upon it, but because these courts have no system of jurisprudence of their own to be administered, except where the title is affected by the Constitution of the United States, or by acts of Congress.

It has been held, accordingly, that we are to look to the local laws for the rule of decision, as ascertained by the decisions of the state courts, whether these decisions are grounded on the construction of statutes, or form a part of the unwritten

law of the state. The court adopts the state decisions, because they settle the law applicable to the case. Such a course is deemed indispensable in order to preserve uniformity; otherwise, the peculiar constitution of the judicial tribunals of the states, and of the United States, would be productive of the greatest mischief and confusion,—a perpetual conflict of decision and of jurisdiction.

In construing the statutes of a state on which land titles depend, say the court, infinite mischief would ensue should this court observe a different rule from that which has been established in the state; and whether these rules of land titles grow out of the statutes of a state, or principles of the common law, adopted and applied to such titles, can make no difference; as there is the same necessity and fitness in preserving uniformity of decisions in the one case as in the other. This court has repeatedly said, speaking of the construction of statutes, that it would be governed by the state construction where it is settled, and can be ascertained, especially [*559 *where the title to lands is in question. (12 Wheat., 167, 168; 6 Pet., 291.) In the case of *Nesmith et al.* v. *Sheldon et al.*, 7 How., 818, decided at the last term, involving a question upon the statutes of Michigan, the court say,—"It is the established doctrine of this court, that it will adopt and follow the decisions of the state courts in the construction of their own constitution and statutes, when that construction has been settled by the decision of its highest judicial tribunal."[1]

Now what can be more peculiarly a matter of local law, and to be ascertained and settled by the state tribunals, than the character and extent of the jurisdiction of their courts, and the effect to be given to their own orders and judgments.

I suppose it will not be denied but that each state has the right to prescribe the jurisdiction of her courts, either by the acts of her legislature, or as expounded by the courts themselves; and that, if that jurisdiction is settled by a long course of decision, or, in respect to the particular case, by the authority which has a right to settle it, this court, professing to administer the laws of the state as they find them, and acting upon their own principle, as well as the principle of the thirty-fourth section of the Judiciary Act, cannot disregard the jurisdiction as thus settled.

It is no answer to this view to say, that the question here is the construction of a private statute of New York. That assumes the very point in controversy. The point is, Can this court reach the question involving the construction of the

[1] APPLIED. *Van Rensselaer* v. *Kearney*, 11 How., 318.

statute? That depends upon the prior one, whether Chancellor Kent acted in the exercise of the jurisdiction of his court in expounding the statute. If he did, the question upon its construction is concluded; and whether the construction be right or wrong is a matter not inquirable into in this collateral way.

The case, therefore, comes down to a question of jurisdiction,—a question which Chancellor Kent himself settled in this very case in 1815, which settlement has since been confirmed by the highest tribunals in the state, and about which no one of them there could be brought to entertain a doubt.

I must be permitted to think, therefore, that, looking at the question as an original one, Chancellor Kent was right in the jurisdiction that he exercised in administering the acts in question; and that, whether so or not, it belonged to the courts of that state to expound and settle the limit of his jurisdiction; and that, when so settled, it becomes a rule of decision for the Federal courts sitting in the state, and administering her laws; and that therefore the order of the Chancellor in question was conclusive upon the matter before him, and is not inquirable into collaterally in a court of law.

*560] *But were we compelled to go behind the order, and to re-examine the case, as upon an appeal, we perceive no difficulty in sustaining it.

When Clarke applied to the legislature, in 1815, for relief, he was the owner of the life estate, and of the ultimate remainder in the premises, the residue belonging to the children; and for this reason, doubtless, the act which was passed at that time left it discretionary with the Chancellor to determine the portion of the proceeds that should belong to Clarke, individually, and also as trustee for the children.

And under this provision of the law, before any order was made for the disposition of the proceeds, the court ordered a reference to the master to ascertain the amount of his debts, and what portion of them had been contracted for the maintenance of the family and education of the children.

The interest of Clarke in the proceeds was properly applicable to his own debts, as well as to the debts contracted for the support of the family; and after the coming in of the report which exhibited the amount of the debts, and for what purposes contracted, the order for the application of the proceeds was made. This is the order referred to and confirmed by the act of 1816.

It, in effect, applied what was regarded by the Chancellor as the interest of Clarke in them to the payment of his own debts; the amount of that interest, as we have seen, having

been left to be ascertained by him in the exercise of his judgment in the matters. That Clarke had a considerable interest is apparent, having united in himself two portions of the estate. That the Chancellor erred, in the exercise of his judgment in dividing the proceeds of the estate between Clarke and his children, according to their respective interests, does not appear, nor can it be shown from any thing to be found in the record; much less can a want of power to act, or an excess of power in acting, be predicated of the exercise of any such discretionary authority.

Then, as to the application of a portion of the fund belonging to the children for the maintenance of the family, as well as their own education.

From the cases already referred to on that subject, we have seen that this is within the acknowledged powers of the Court of Chancery, and of which it is in the habitual exercise, in cases where the parents are in narrow circumstances, and unable to furnish the means of support. The application is made for the benefit of the children, that they may have the comforts and enjoyments of a home, with all the wholesome and endearing influences of the family association.

*Even beyond this, small annuities have been settled upon the father and the mother, in destitute circumstances, out of the estates of the infant children. [*561

It was a knowledge of these principles, which were familiar to the mind of Chancellor Kent, as was the whole system of the powers and duties of his court over the persons and estates of infants, that dictated the granting of the order in question; and, in my judgment, so far as the power and authority of the court was concerned, which is the question here, it requires but an application of these principles to the facts before him to enable us to see that it was well warranted.

Again, it is said that the children were not parties to the proceedings. The same may be said concerning the exercise of all the powers of the Court of Chancery over the estates of infants.

The answer is, the proceeding is not an adversary suit. The estate is regarded as a fund in court, and the infants as wards of the court; the Chancellor himself, as the general guardian, exerting his great power, either inherent or vested by positive law, over a class of persons specially committed to his care, for their own benefit, for the proper management of their estates, real and personal, for their maintenance and support, for their education and advancement in life.

It is a proceeding *in rem*, the property itself in *custodia legis*; and if a guardian had been appointed, it would have

been but a desecration of the power of the court, which, in the proceeding before us, was exercised by the court itself, through the agency and instrumentality of its officers.

The rule in respect to adversary suits against infants, requiring the appointment of a guardian, *pendente lite*, has no sort of application to the proceedings in question.

It has also been argued, that the order of the Chancellor, authorizing Clarke to sell and convey the premises in question, required a certificate of the approval of one of the masters of the court to be indorsed on the deed; and that no such certificate has been given or indorsed thereon.

The deed to De Grasse was executed on the 2d of August, 1821; and on the next day it appears that the master was a witness to prove the execution before the commissioner who took the acknowledgment.

It further appears, that on the same day, the master, having had the life estate of Clarke in the premises previously conveyed to him, in trust, in order to complete the title, indorsed on the back of the deed, and executed under his hand and seal, a release of this life interest to the purchaser, and duly acknowledged *the same, that it might be recorded in the register's office along with the deed. This was done, as the master recites in the release, at the request of the trustee, and for the purpose of completing the title.

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One can hardly conceive of a more effectual approval, than is to be derived from these acts of the master; for without the release of the life estate, which he held in trust, the title could not have been perfected, and the sale must have fallen through. The release enabled the trustee to complete it, and invest De Grasse, the purchaser, with the fee.

But the courts of New York in the case already referred to have held, that, upon the true construction of the order, the approval of the master was not necessary, as the direction in that respect was limited to conveyances by the trustee in satisfaction of debts Even if this construction should be regarded as doubtful, or that requiring the approval was thought to be the better one, inasmuch as this construction has been given by the highest court of a state upon this very title, in a case in which its judgment was final, the habitual deference and respect conceded by this court to the decisions of the state courts upon their own statutes and orders of their courts would seem to render it conclusive.

This view was directly affirmed, and acted on, in the case of *The Bank of Hamilton* v. *Dudley's Lessee*, 2 Pet., 492. That, as is the case before us, was an action of ejectment by the heir, to recover a tract of land situate in the city of Cincin-

nati. The defendant held under a deed made by administrators, upon a sale under an order of the Court of Common Pleas for the County of Hamilton, which possessed the powers of an Orphans' Court.

The title depended upon the effect to be given to the order under which the sale took place. It was made at the August term, and entered as of the May term preceding. It was alleged that, though granted at the May term, the clerk had omitted to enter it. The law conferring the powers of the Orphans' Court upon the Common Pleas had been repealed between the May and August terms; and the question was whether the order was a nullity, or valid until set aside.

The sale had taken place at an early day, and the property had become of great value. The case was most elaborately argued. The action of this court, independently of the principle decided in the case, is worthy of remark.

Chief Justice Marshall, in delivering the opinion, observed, that the case had been argued at the last term, on the validity of the deed made by the administrators; but as the [*568 question *was one of great interest, on which many titles depended, and which was to be decided upon the statutes of Ohio, and as the court was informed that the case was depending before the highest tribunal of the state, the case was held under advisement.

The state court held, that the order of the Court of Common Pleas, entered at the August term as of the preceding May term, was *coram non judice*, and void; and that the deed under which the defendant derived title was, of course, invalid.

This court held, that the judgment of the Supreme Court of Ohio should govern the case. I will give its language.

"The power of the inferior courts of a state," said the Chief Justice, "to make an order at one term as of another, is of a character so peculiarly local, a proceeding so necessarily dependent on the revising tribunal of the state, that a majority consider that judgment as authority, and we are all disposed to conform to it."

I will simply add, that the Court for the Correction of Errors in New York possessed a revising power in all cases over the orders and decrees of the Chancellor, and that that court has held, upon this very title, not only that the order in question was an order entered by him acting as a court, but, in expounding it, that the deed of conveyance given to De Grasse under it did not require the approval of a master. Further comment to show the identity of the two cases would be superfluous.

But I forbear to pursue this branch of the case farther.

The validity of the execution of the deed to De Grasse by the trustee, as it respects the alleged want of approval, stands,—

1. Upon the acts of the master in the execution of it, as a substantial approval within the meaning of the order; and,

2. Upon the decision of the highest judicial tribunal of the state, whose laws we are administering, that, upon a fair interpretation of the terms of the order, an approval was not essential.

It has also been argued, that, according to the true construction of the order, the sale should have been for cash, and that here it was otherwise.

But this is an action at law; and the deed on the face of it shows a cash consideration of $2,000. The nature of the consideration was not inquirable into, and should have been excluded at the trial. If the complainant had sought to invalidate the proceedings on that ground, he should have gone into a court of equity, where the question could have *564] been appropriately *examined, and justice done to all the parties. That it was not examinable in a court of law is too plain for argument. The recital of the considerations can no more be varied by parol proof than any other part of the deed. (2 Phill. on Ev., 353, 354, 2 Cow. & Hill, *n.* 289, and cases there cited; 1 Id., *n.* 228, p. 384; 7 Johns. (N. Y.), 341; 8 Cow. (N. Y.), 290; 2 Den. (N. Y.), 336; 4 N. H., 229; 1 J. J. Marsh. (Ky.) 388, 390.)

I have thus gone over the several grounds relied on for the purpose of impeaching the title of the defendant to the premises in question; and, although in the minority in the judgment given, have done so, not so much on account of the magnitude of the interest depending, which is great of itself, as of the importance of the principle involved; and upon the application of which the judgment has been arrived at.

Notwithstanding several questions have been brought within the range of the discussion, there are but two, in reality, involved in the determination of the case. 1. The effect to be given to the order of Chancellor Kent made on the 15th of March, 1817; and 2. The execution of the conveyance by Clarke, the trustee, under this order.

If the order was made by the Chancellor in the exercise of his jurisdiction as a court, his judgment was conclusive in the matters before him; and there is an end of that question. It affords an authority to sell and convey, that cannot be controverted in a court of law. And the validity of the deed executed under it stands upon an equally solid foundation.

The title of the defendant, therefore, would seem to be beyond controversy, were it not for the principle against which we have been contending, and which imparts to the case its greatest importance, namely, the right claimed for this court to inquire into the nature and character of the jurisdiction exercised by the Chancellor in making the order coming before us collaterally; and as this court determines that jurisdiction to be general or special, to refuse or consent to go behind his judgment, and re-open and rejudge the merits of the case; and according to the opinion entertained upon that question, to affirm or disaffirm the validity of all acts and proceedings that have taken place under it. And this, too, in a case where the jurisdiction thus exercised by the Chancellor has been settled by himself in his own court, under the state laws, and affirmed by the judgment of the highest judicial tribunals of the state.

It is apparent that, if this principle becomes engrafted upon the powers of this court, and is to be regarded as a rule to guide its action in passing upon the judgments of the state courts coming up collaterally, a revising power is thus indirectly *acquired over them in cases where no such [*565 power exists directly, under the Constitution or laws of Congress. For, if the right exists to inquire into the kind and character of the jurisdiction, without regard to that established by the laws and decisions of the states; and to determine for itself whether the jurisdiction is general or special, and if the latter, to go behind the judgment to see whether the special authority has been strictly pursued, there is no limit to this revising power, except the discretion and judgment of the court.

The principle will be as applicable to every state judgment coming before us collaterally, as to the one in question. It denies, virtually, to the states the power, in the organization of her courts, to prescribe and settle their jurisdiction, either by the acts of her legislature, or the adjudication of her judicial tribunals.

I cannot consent to the introduction into this court of any such principle, and am, therefore, obliged to refuse a concurrence in the judgment given.

CHARLES A. WILLIAMSON AND CATHARINE H. WILLIAMSON, HIS WIFE, PLAINTIFFS, *v.* THE IRISH PRESBYTERIAN CONGREGATION OF THE CITY OF NEW YORK.

The principles established in the preceding case of *Williamson and Wife* v. *Berry* applied to this case.

The circumstance, that the defendants paid to the grantees of George De Grasse a valuable consideration for the premises in dispute, does not give them a valid title against the plaintiffs.[1]

THIS case was similar to the preceding one, in which the same facts and principles were involved. The only difference between them was, that the following point was certified in this case, which was not in the preceding, viz.:—

8. Whether the defendants, who derive title *bonâ fide*, and for a valuable consideration, by purchase through the grantees of George De Grasse, as set forth in the case, have a valid title as against the plaintiffs.

It was argued in conjunction with the preceding case, as has been mentioned in the report of that case.

Mr. Justice WAYNE delivered the opinion of the court.

In this case the points certified to this court are identical with those certified in the case of *Williamson and Wife* v. **Joseph Berry*, except the eighth. We direct that our rulings in that case shall be sent to the Circuit Court, as our answers to the points certified in this case. And further rule to the eighth point certified in this case, that the defendants, having paid to the grantees of George De Grasse a valuable consideration for the premises in dispute, do not thereby acquire a valid title against the plaintiffs.

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Mr. Chief Justice TANEY, Mr. Justice CATRON, and Mr. Justice NELSON dissented. See the report of the preceding case.

[1] See *Suydam* v. *Williamson*, 24 How., 431.

CHARLES A. WILLIAMSON AND CATHARINE H. WILLIAMSON, HIS WIFE, RUPERT J. COCHRAN AND ISABELLA M., HIS WIFE, AND BAYARD CLARKE, PLAINTIFFS, *v.* GEORGE BALL.

The principles established in the case of *Williamson and Wife* v. *Berry* applied to this case also.

Under the acts of the Legislature of New York for the relief of Thomas B. Clarke, the Chancellor had no authority to order that the trustee might make a conveyance of any part of the premises devised for a precedent debt due by the trustee to his grantee.

The deed executed by Clarke to Chrystie in this case was not made in the due execution of the power and authority to sell and convey, though approved by the master in conformity with the Chancellor's order, it not having been within the Chancellor's jurisdiction to order that the trustee might make a conveyance of the premises to a creditor in payment of the debt.

Although the defendant in this case may have paid to such a grantee a valuable consideration, yet he cannot be said to have acquired any title against the plaintiffs; inasmuch as Clarke had no lawful authority to convey to his grantee, that grantee had no right to convey to another.[1]

THIS case was similar to the two preceding ones in all the leading facts. It will be perceived, however, that all the children of Thomas B. Clarke now united as plaintiffs.

Upon the trial in the court below, the will of Mary Clarke, the acts of the legislature of the state of New York, the orders of the Chancellor of that state, and other facts, were shown, as in the case of *Charles A. Williamson and Wife* v. *Joseph Berry*.

It further appeared in evidence, that on the 8th of December, 1818, Mr. Clarke conveyed the lot in question, with other lots, to Albert Chrystie, reciting that "the said Thomas B. Clarke is justly indebted to the said Albert Chrystie in the sum of $525, and is willing to convey in satisfaction of such debt the premises hereinafter mentioned and described;" and declaring, *"that the said Thomas B. Clarke, in [*567 consideration of the premises, and of $525 to him in hand paid," conveys, &c.

This deed was approved by James A. Hamilton, master in Chancery. There was also a quitclaim executed by him, he having acquired a title to Mr. Clarke's life estate, under a sale upon execution.

A conveyance from Mr. Chrystie to James Covell, from Covell to John R. Driver, and the will of Driver, were also shown.

A verdict was taken for the plaintiffs, subject to the opinion of the court, upon a case. On the argument, the judges

[1] See *Suydam* v. *Williamson*, 24 How., 481.

ruled as stated in *Williamson* v. *Berry*, and were divided in opinion upon the following points:—

1. Whether the authority given by the said acts of the legislature to the trustee, to sell the estate, was a special power, to be strictly pursued, or whether he acquired the absolute power of alienation, subject only to review and account in equity.

2. Whether the orders set forth in the case, made by the Chancellor in this behalf, were authorized by, and in conformity to, the said several acts of the legislature, and are to be regarded as the acts of the Court of Chancery, empowered to proceed as such, or the doings of an officer, acting under a special authority.

3. Whether the Chancellor had competent authority, under the said acts, to order or allow a conveyance of the premises by the trustee, in payment or satisfaction of a precedent debt owing by the trustee to the grantee.

4. Whether the deed executed by Thomas B. Clarke to Albert Chrystie, stated in the case, was in due execution of the power and authority of said trustee.

5. Whether the defendant, deriving title by purchase *bona fide*, and for a valuable consideration, from such grantee, has a valid title against the plaintiffs.

It was argued in conjunction with the case of *Williamson and Wife* v. *Berry*, as was stated in the report of that case.

Mr. Justice WAYNE delivered the opinion of the court.

In this case Thomas B. Clarke made a conveyance of the premises in dispute to Albert Chrystie for a debt of $525; and the approval of the master in chancery is indorsed upon the deed. The plaintiff objected to it as any evidence of title, on account of its having been made without authority of law.

Chrystie conveyed the premises in dispute to James Covell, for the consideration of six hundred dollars. Covell and wife *conveyed the same to John R. Driver for eight hundred dollars. Driver died, having devised the premises to his executors, Nicholas Zelphen and George Deroche.

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In the course of the trial of the cause in the Circuit Court, the judges thereof were divided in opinion upon five points of law, and have certified them to this court for decision.

The first and second points certified in this cause have been decided by this court, in its ruling of the second and third points in the case of *Williamson and Wife* v. *Joseph Berry*. We direct, that those rulings of the second and third points in the case just mentioned shall be taken as the answers given by this court to the first and second points in this case.

To the third point in this case, we rule, that the Chancellor had authority, under the acts passed for the relief of Thomas B. Clarke, to assent to a conveyance of the premises in dispute by his trustee, but that it was not within the jurisdiction given to the Chancellor by the acts of the state of New York mentioned in this case, to order that the trustee might make a conveyance of any part of the premises devised, as is mentioned in this case, for a precedent debt due by the trustee to his grantee.

To the fourth point, we rule, that the deed executed by Clarke to Chrystie was not made in the due execution of the power and authority to sell and convey, though approved by the master in conformity with the Chancellor's order, it not having been within the Chancellor's jurisdiction to order that the trustee might make a conveyance of the premises to a creditor in payment of the debt.

To the fifth point, which is, whether the defendant, deriving title by purchase *bonâ fide* and for a valuable consideration from such grantee, has a valid title against the plaintiffs, we answer, that, though the defendant may have paid to such a grantee a valuable consideration, he cannot be said to have acquired any title against the plaintiffs; inasmuch as Clarke had no lawful authority to convey to his grantee, that grantee had no right to convey to another.

We direct the foregoing rulings to be certified to the Circuit Court, as the answers of this court to the points certified to it for decision.

Mr. Chief Justice TANEY, Mr. Justice CATRON, and Mr. Justice NELSON dissented. See the report of the case of *Williamson and Wife* v. *Berry*.

*ADAM L. MILLS, JOHN H. GAY, CHARLES MULLIKIN, JOHN O'FALLON, WILLIAM C. WIGGINS, ANDREW CHRISTY, ELIZABETH CHRISTY, MARY F. CHRISTY, MELANIE CHRISTY, WHICH MELANIE IS THE WIDOW, AND WHICH SAID ELIZABETH CHRISTY AND MARY F. CHRISTY ARE THE ONLY CHILDREN AND HEIRS AT LAW OF SAMUEL C. CHRISTY, DECEASED,—SAID CHILDREN BEING INFANTS, AND APPEARING BY SAID MELANIE, THEIR NEXT FRIEND, —EMILY PRATTE, WIDOW OF BERNARD PRATTE, LEWIS PENGUET, AND THERESE, HIS WIFE, STEPHEN F. NIEDLET AND CELESTE, HIS WIFE, LOUIS V. BOGY AND PELAGIE, HIS WIFE, JOSEPH BLAINE AND AIMI, HIS WIFE, WHICH SAID EMILY PRATTE, BERNARD PRATTE, THERESE PENGUET, CELESTE NIEDLET, PELAGIE BOGY, AND AIMI DIANE BLAINE, ARE CHILDREN AND ONLY HEIRS AT LAW OF BERNARD PRATTE, DECEASED, PLAINTIFFS IN ERROR, *v.* THE COUNTY OF ST. CLAIR AND JAMES HARRISON.

In the year 1819, the Legislature of Illinois authorized Samuel Wiggins, his heirs and assigns, to establish a ferry on the east bank of the River Mississippi, near the town of Illinois, and to run the same from lands "that may belong to him," provided the ferry should be put into actual operation within eighteen months.

At this time he had no land, but within the eighteen months acquired an interest in a tract of one hundred acres.

In 1821, another act was passed, authorizing him to remove the ferry "on any land that may belong to him" on the said Mississippi River, under the same privileges as were prescribed by the former act.

The words of this act, "on any land that may belong to him," must be construed to apply to the lands which then belonged to him, and not to such as he obtained after the passage of the act, viz., in 1822.[1]

The following rules for construing statutes applied to the case, viz.:—

First,—That in a grant, designed by the sovereign power making it to be a general benefit and accommodation to the public, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government; and therefore should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed, it must fail.[2]

Secondly,—If the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any apparent violation of the apparent objects of the grant, if in such case one interpretation would render the grant inoperative and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted.

The jurisdiction of this court, under the twenty-fifth section of the Judiciary Act, extends to a review of the judgment of a state court, where the point involved was the alleged violation of a contract granting a ferry right by a

[1] APPLIED. *Sullivan* v. *Board of Supervisors*, 58 Miss., 801. CITED. *Conway et al.* v. *Taylor's Exec.*, 1 Black, 630.

[2] FOLLOWED. *Rice* v. *Railroad Co.*, 1 Black, 380. CITED. *Mistorn* v. *Larue*, 23 How., 437.

state to an individual, but it does not extend to a case where the alleged violation of a contract is, that a state has taken more land than was necessary for the easement which it wanted, and thus violated the contract under which the owner held his land by a patent. It rests with state legislatures and state courts exclusively to protect their citizens from injustice and oppression of this description.[8]

THIS case was brought up from the Supreme Court of the state of Illinois, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

Mills and others filed their bill in chancery in the state court of Illinois, seeking to obtain an injunction against the defendants *in error. The bill states the case of [*570 the complainants as follows:—

The people of the western part of Illinois had from the earliest settlement of that country, maintained a constant commercial intercourse with the town of St. Louis, and long felt the necessity for increased facilities in crossing the Mississippi River. For the purpose of securing these facilities, the state made a contract with Samuel Wiggins for the establishment of a ferry across that stream, with boats to be propelled by steam or horse power. An act of the General Assembly was passed, which was approved on the 2d of March, 1819, which was as follows:—

"An act to authorize Samuel Wiggins to establish a Ferry upon the Waters of the Mississippi. Approved March 2, 1819.

"SEC. 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly, that Samuel Wiggins, his heirs and assigns, be, and they are hereby, authorized to establish a ferry on the waters of the Mississippi, near the town of Illinois in this state, and to run the same from lands at the said place that may belong to him. Provided, that he shall not use any boat or water-craft, except such as shall be propelled or urged to the water by steam, horses, oxen, or other four-footed animals. Provided, that the said Samuel Wiggins, his heirs and assigns, shall have the said ferry in actual operation within eighteen months from and after the passage of this act.

"SEC. 2. And be it further enacted, that no person or persons, except those who have ferries now established at this place, shall establish any ferry of the description aforesaid within one mile of the ferry established under this act. And if any person or persons shall, contrary to the provisions of this act, run any boat or boats of the description aforesaid, he,

[8] CITED. *Dodge* v. *Woolsey*, 18 How., 379.

she, or they shall forfeit every such boat, with its furniture and apparel, to the said Samuel Wiggins, his heirs and assigns, which may be attached and recovered before any court in this state having competent jurisdiction.

"SEC. 3. And be it further enacted, that it shall and may be lawful for the said Samuel Wiggins, his heirs or assigns, to demand and receive the same rates of ferriage as are now of right demandable at the ferry established nearest to the ferry authorized to be established by this act. Provided, that no more shall be charged for a wagon, cart, or other carriage, if loaded, than could be charged if empty.

"SEC. 4. And be it further enacted, that the ferry hereby *571] established shall be subject to the same taxes as are now, or hereafter *may be, imposed on other ferries within this state, and under the same regulations and forfeitures. And that if the provisions of the second section of this act shall be made to appear to the General Assembly to be injurious to the public good, that then, and in such case, the said second section may be repealed."

At the date of this act, Wiggins did not own any land near the town of Illinois; but within the time allowed by the act for the establishment of the ferry, he purchased a tract of land of one hundred acres, and established the ferry, with boats propelled by horses, according to the terms of the act.

He increased the means of transportation as the public wants required, and changed the boats employed from boats propelled by horses to boats propelled by steam, so as to comply with the letter and spirit of his contract with the state of Illinois, and meet all the demands of the increasing population and commerce.

The bill claims, that under this act of the 2d of March, 1819, Samuel Wiggins, his heirs and assigns, were entitled to the perpetual franchise of maintaining a ferry across the Mississippi from any point near the town of Illinois, upon any land that might at any time belong to him or them.

The bill states that the bank of the Mississippi, opposite the town of St. Louis, is an alluvial formation, which is continually falling into the stream, and that the character of the stream is such that, by reason of the frequent changes in the channel, the sudden formation of sand-bars, and the falling of the banks, it became necessary for Wiggins, in order to fulfil his contract with the state of Illinois, to acquire title to a large space of land on the bank of the river, in order to change the place of landing as the changes in the river and in its banks might require.

The Legislature of Illinois, appreciating this necessity, and

recognizing the franchise as perpetual, passed an act on the 6th day of February, 1821, the essential parts of which were as follows:—

"An Act to authorize Samuel Wiggins to make a Turnpike Road, and for other Purposes. Approved February 6, 1861.

"SEC. 1. Be it enacted, by the people of the state of Illinois, represented in the General Assembly, that Samuel Wiggins, his heirs or assigns, be, and hereby are, authorized to make and construct a turnpike road, of one hundred feet wide, to commence on the Mississippi River, opposite to St. Louis, *on lands that may belong to him, to run thence across the American Bottom to the bluffs within two [*572 miles of George Swaggart's, and to construct and erect all necessary bridges on said road; and that he or they be, and are hereby, authorized to build and make said turnpike road through the lands of any person or persons whomsoever, except yards, gardens, orchards, or dwelling-houses; that, when the aforesaid road is about to be carried through any improved land, the maker of said road shall first obtain the consent of the proprietor or proprietors of said grounds, and should the parties not agree on the amount of said damages, then a jury of six reputable freeholders should be summoned, and being duly sworn before any justice of the peace of the county faithfully and impartially to assess the damages, which damages shall be paid before the said road shall be permitted to pass through such grounds."

"And whereas the said Samuel Wiggins, his heirs and assigns, were authorized to establish a ferry upon the waters of the Mississippi River, near the town of Illinois, in this state, and a sand-bar having been formed since that time opposite said ferry, therefore:—

"SEC. 5. Be it further enacted, that the said Samuel Wiggins, his heirs and assigns, be, and they are hereby authorized to remove said ferry on any land that may belong to him or them on the said Mississippi River, under the same privileges as were prescribed by the act entitled, 'An act to authorize Samuel Wiggins to establish a ferry upon the waters of the Mississippi,' approved March 2d, 1819."

On the 18th of July, 1822, Wiggins acquired title to a tract of four hundred acres of land, adjoining the tract from which he first ran his ferry. The tract so acquired is situated on the bank of the river below his first tract, and was necessary to the owners of the ferry franchise in order to secure a con-

venient landing of the boats, as changes occurred in the channel or in the bank of the river.

The bill states several conveyances and descents, by which the complainants have become invested with the title to all the land held by said Wiggins, and with the franchise granted by the state of Illinois.

It is also averred that Wiggins, while the owner of the franchise, fulfilled all the duties and obligations which he had assumed under his contract with the state of Illinois, and that his assignees, owners of said franchise, have ever since his transfer of the franchise in like manner fully discharged those duties; that speedy, secure, and comfortable passage
*573] has been *at all times afforded for all persons and property offered to be crossed over the river, in such vessels only as are required by the act granting the franchise.

The bill then states an act of the legislature of the state of Illinois, approved on the 2d of March, 1839, by which commissioners were appointed to locate a road and ferry-landing between Cahokia Creek and the Mississippi River, opposite St. Louis; the road and ferry-landing to be three hundred feet wide, upon the most eligible ground for the purpose. This act authorized the County Commissioners' Court of St. Clair County to cause the land on which the road and ferry-landing should be located to be condemned, and pay the owners of the land the damages; and after such payment the said court should have power to enter upon the land so condemned, and establish a ferry across the Mississippi River, and might either carry on the ferry for the county itself, or lease it for any term not exceeding five years, to any lessees.

The commissioners thus appointed located the road and ferry-landing, three hundred feet wide, upon the land which Wiggins acquired in July, 1822, and which was conveyed by him with the franchise.

The land was condemned, and its value estimated at six hundred dollars, being less than the annual ground rent which it would produce without any connection with any ferry privilege.

In estimating the damages to be paid, the jury were expressly directed to confine their estimate of the damages to the value of the land itself, and not to consider any interference with the ferry franchise of the complainants as a subject of compensation.

The bill states that the county of St. Clair, through its agents, entered upon and took in possession the said lands so condemned, and has leased the same, together with the ferry authorized by the said act of 1839, to James Harrison, at a

yearly rent of $800; and that a ferry has been established from said land to the city of St. Louis. The rates of ferriage charged by said Harrison are fixed in his lease, exhibited with the bill, as exhibit S. No. 18.

The complainants aver that the land so taken from them is a part of their ferry-landing, as authorized by the two acts of the legislature under which they claim, and that the land so taken is indispensable to the exercise of the franchise with which they are invested. From time to time they have been compelled to change their place of landing, as the changes in the river, and its banks and sand-bars, required, so that the whole *front on the river has been necessary to the [*574 enjoyment of their franchise and the performance of their duty, and that the said land so taken from them is not only the most convenient point on their land for their ferry-landing, but is the only point where boats can securely be landed without running far up the stream, so as to make their trip about twelve hundred yards longer than if they still owned and could use the land so taken from them.

The complainants allege that the act of the legislature of Illinois of March 2, 1839, authorizing the taking of a part of their ferry-landing, is a violation of the first clause of the tenth section of the first article of the Constitution of the United States, which prohibits the states from passing laws impairing the obligation of contracts.

The bill prays for an injunction to restrain the defendants from maintaining a ferry from the land so taken from the complainants.

To this bill there was a demurrer, which was sustained by the Circuit Court of St. Clair County, and the bill dismissed. An appeal was taken to the Supreme Court, and the decree of the Circuit Court affirmed.

From this decree of the Supreme Court of the state of Illinois, a writ of error brought the case up to this court.

It was argued by *Mr. Gamble* and *Mr. Webster*, for the plaintiffs in error, and *Mr. Breeze*, for the defendants.

Mr. Gamble made the following points, which he sustained orally. (*Mr. Breeze* and *Mr. Webster* both presented written arguments, of which the Reporter can only give extracts.)

1. The franchise which the complainants hold by purchase from Wiggins, extended to the land which has been taken from them under the act of the legislature of Illinois of 2d March, 1839.

2. The land so taken is necessary to the enjoyment of the franchise.

3. No compensation has been made to the complainants, nor is any authorized to be made, for the violation of the franchise.

4. The act of the Illinois legislature complained of is a violation of the Constitution of the United States, under the earlier decisions of this court. *Fletcher* v. *Peck*, 6 Cranch, 87; *Providence Bank* v. *Billings*, 4 Pet., 514; *New Jersey* v. *Wilson*, 7 Cranch, 164; *Dartmouth College case*, 4 Wheat., 518.

5. The act complained of is not constitutional, within the scope of the later decisions in the *Charles River Bridge case*, 11 Pet., 549; and *West River Bridge case*, 6 How., 507.

*575] *Mr. *Breese* first contended, that this case did not fall within the jurisdiction of the court, because the Supreme Court of Illinois rested its decision upon the construction of the act of the Legislature, and the extent of the ferry franchise acquired under it; limiting it to the land owned by Wiggins when the act of 1821 was passed, with the exercise of which franchise the law complained of did not interfere.

2. That the grant to Wiggins was of no validity, because the legislature had no power to make grants of privileges to be exercised beyond its territorial limits and over a navigable stream, declared by law to be a public highway.

3. That the laws in question were not contracts, within the meaning of the prohibition of the Constitution of the United States. That private contracts alone were contemplated in this provision of the Constitution.

4. That these laws in themselves had none of the features of contracts, for the want of mutuality, &c.

5. Admitting, however, for the sake of the argument only, that these laws are contracts, then the appellees insist that the legislature of Illinois has, in no degree, impaired their obligation, by any other act in favor of other parties subsequently passed, and certainly not by the act of March 2, 1839, about which this controversy has arisen. The appellants, to sustain their complaint, assume the ground, that, by the act of 1819, the authority to Wiggins to establish a ferry was perpetual and exclusive, and that having become the proprietor of other lands at a great distance from the tract he pretended to own in 1819, the legislature authorized him, by the act of 6th February, 1821, to remove his ferry to them, and thereby, as his assigns, the appellants, contend, have necessarily excluded all other ferries between them, making theirs a movable one, covering a distance of a mile or more up and

down the river, and authorizing them to shift it from point to point, as their views of expediency might suggest.

The appellees contend, that the appellants have not, as the assigns of Wiggins, any exclusive right to a ferry franchise by the act of 1819, and that their ferry is not of that ambulatory character they insist it has been made by the act of 1821.

The court understands, that, when the act of 1819 was passed, Wiggins owned no land on the river near the town of Illinois; that it was not until a year or more thereafter that he obtained title to an undivided two sevenths of a tract of one hundred acres, of the heirs of one Piggot, and known as claim 624. Upon this tract he located his ferry, at a certain known and fixed point. It will be further understood by the plat of survey *before the court, that the town of [*576 Illinois is not on the river, but on the east bank of Cahokia Creek, and some hundred yards from the river, and from it to the river there never was a public road until after the passage of the act of 1839, under which appellees claim. The grantor of appellants, owning the land between the creek and the river, and the whole of the river bank, could, and did up to that time, prevent all competition with him and his assigns and keep off all rivals; and for a similar purpose he enlarged his possessions on the bank of the river by the purchase of land from Jarrot and others, in 1822, known as claim 579, on which the appellees established their ferry, at the termination of a public road, regularly laid out, three hundred feet wide, from the bridge over Cahokia Creek to the river, and through the land of the appellants, after the same was regularly condemned in pursuance of the laws of the state of Illinois, and compensation tendered. To this last-named tract, appellants' ferry was removed under the authority supposed to be granted by the act of 1821, although Wiggins did not, at the passage of that act, own it. To whatever point, then, on this tract, it was removed, the appellees insist, that point became the ferry-landing, and there appellants' privileges were to be exercised, and not elsewhere. It could not thereafter be removed to the first location without the consent of the Legislature, nor to any other point on the tract. A ferry must, from the nature of such establishments, be kept stationary at one point, until legislative sanction can be had to remove it to another; and so Wiggins thought when he applied to the Legislature to remove it from claim 624 to claim 579. And this from motives of public convenience. It would be a great injury to the public to permit the owner of such a franchise, at his discretion, and to suit his whim or caprice, to move it from point to point. When a point was selected, that became the "ferry,"

and there and there only, and from it, could the privilege be exercised. The right of way over the water could not, by any reasonable construction, extend over every particle of space covered by miles of distance. A reasonable space for landings and ferry-ways is all that could be claimed. The excuse put forth by appellants, for shifting their landing,—the character of the current and the texture of the banks,—is all idle, as every one knows who has ever seen the bank of the Mississippi opposite St. Louis. A landing can be made at one point as well as at another, if proper means are used for grading the banks, and proper platforms provided. The object and design for shifting the landing was undoubtedly to keep off rivals,—to prevent competition, and thus enable, for all time to come, the appellants to divide their fifty thousand dollars a year.

*577] *The ferry being established, by the act of 1819, on the Piggot tract (claim 624), within eighteen months after its passage, Wiggins had the right, so far as the Legislature could confer it, to all the advantages which might result from it, and to all the provisions of the act, and nothing more.

Did, then, the legislature, by that act, intend that his privilege should be exclusive forever, and is that intention manifest from the terms used in the act?

The first section contains the grant, if it be one, and is, in substance, as follows:—That Samuel Wiggins, his heirs or assigns, are authorized to establish a ferry on the waters of the Mississippi, near the town of Illinois, in this state, and to run the same from lands at the said place that may belong to him, with a provision that he shall use steam or the power of four-footed animals, and provided, that the same shall be in operation within eighteen months, &c.

The second section provides, that no person or persons, except those who had ferries then established at that place, should establish any ferry of that description within one mile of it, and if it is done, a forfeiture to Wiggins of the boats, furniture, and apparel shall be the consequence.

The third section authorizes Wiggins to receive the accustomed rates of ferriage, and the fourth and last section subjects it to taxes, and then declares, "If the provisions of the second section shall be made to appear to the General Assembly to be injurious to the public good, that then, and in such case, the said section may be repealed."

The appellants contend, that the grant would be perfect without the second section. So it would; but when arraigning an act of the legislature of a sovereign state as repugnant to the Constitution of the United States, because it repealed

a former act of that body, we must examine and see what the first act is,—we must take the whole of it together, to ascertain the intention of the law-maker; and we see in this act of 1819 a right reserved to the state to repeal that part of it which bestows the character of exclusiveness upon the appellants' privilege. The legislature of 1819 acted upon circumstances as they then were, and foreseeing that, from the great advantages the state possessed, in soil, climate, and power of production, and its great capacity for settlement and cultivation, people from distant lands would seek it for a home, reserved the right to take away a privilege, which, when granted, might be of great public benefit, but likely to become in time oppressive.

With commendable forecast, the fourth section was inserted, and became an important part of the so-called contract, [*578 and the *act of 1821 was passed, with the same power to repeal included. The acts were accepted, with that power reserved. In 1833, (Rev. Laws, 310, 311), the legislature determined that section was injurious to the public good, as well as the fifth section of the act of 1821. Fourteen years' experience had satisfied them, that what was intended for the public benefit had become an oppressive monopoly, and they performed a most popular act by repealing them, thus taking away all pretext of exclusiveness, and opening the whole subject to further legislation. This was "nominated in the bond," and the appellants cannot with any propriety or justice complain, if it is injurious to them.

The legislature, then, having, by the act of 1833 (Rev. Laws of 1833, p. 310), repealed the restrictive clause of the second section of the act of 1819, and of the fifth section of the act of 1821, proceeded in 1839, in obedience to public clamor, excited to a high tone by the continued and oppressive exactions of this monopoly, and its repeated failures, and manifest inability or want of desire to satisfy the public demands for proper facilities for crossing the river, to put measures in train to satisfy the public want. The preamble to the act of 2d March, 1839, assigns the reason for its passage,—the facts upon which the Legislature acted,—and they must be taken to be true. It is a legislative decision, that the exigency had arisen, which, on the repeal of the second section of the act of 1819, required increased facilities of approach to a place then grown to be a great commercial city, and the great market of the state.

By examining the provisions of that act, it will be seen that in no part of it is an expression used of a design to take from the appellants their franchise; theirs still exists

in all its rights precisely as it did before the passage of the act. No interference with their ferry-ways is contemplated or attempted, no part or portion of their rights, as secured by the act of 1785 or 1805, is taken from them or abridged. Although the revenue of tolls may be lessened by this rival ferry, yet the right itself is as perfect as ever. It is still lawful for them to receive all the tolls that may come to their ferry. Should the new ferry so successfully compete with them as entirely to take from them all the travel, still their rights, guaranteed by the act of 1785 and 1821, yet inure to them. *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420.)

The appellees perceive no distinction between the rights of passage and of ferriage, and if it was lawful, as it was unquestionably, to establish the Warren Bridge, by which all the tolls were taken from the Charles River Bridge, previously established by an act of the Legislature of Massachu-
[*578] setts, it is not perceived *why the same results should not rightfully flow in this case, the more especially as the legislature had reserved the right in the very act which gave the authority, to destroy the character of exclusiveness for which the appellants contend. Legislation affects every day the value of property, and it must be so in the nature of things. *Providence Bank* v. *Billings*, 4 Pet., 514.

If the act of 1839 designed to seize the ferry-ways of the appellants, there would be ground of complaint; but it does not. It designs only to establish a healthy and necessary competition, at a very important point, by which the public good is vastly promoted, and the land taken for such a beneficial public purpose, for a road and landing, has been condemned in the usual mode, the damages assessed, and a tender of the amount made to appellants.

Whether the road is too wide or not is not for this court to determine; it is only to determine whether, in the adjudication of the rights of these parties by a state court, validity has been given to a law of the state impairing the obligation of any contract entered into between the state and the appellants, and doing, by such decision, injustice to them. The appellees can see no ground for such a pretence, and without taking up more time, they submit the case on their part to the court, confident that this most just and enlightened tribunal will not condemn a law of a sovereign state, unless that law is manifestly repugnant to the Constitution of the United States.

Mr. Webster replied to each one of these points, and par-

ticularly the last, citing and commenting upon many parts of the bill, which were all admitted by the demurrer, in order to show that the act of 1839 had destroyed the value of the ferry privilege.

Mr. Justice CATRON delivered the opinion of the court.

By an act of March 2d, 1839, the legislature of Illinois appointed five commissioners to locate a road and ferry landing, three hundred feet wide, on the east bank of the River Mississippi, opposite to the city of St. Louis; the road to extend back to Cahokia Creek. The road and landing were accordingly located; the distance from the river to the creek being about sixty poles. The ferry having gone into operation under the act of 1839, this bill was filed, seeking to obtain a perpetual injunction against an exercise of a ferry privilege, on the ground, among others, that Samuel Wiggins and his assignees were entitled to the exclusive ferry right at that place, by contract with the state of Illinois; and that said contract was violated by *the act of 1839, and the [*580
establishment of a road and ferry under and by force of its provisions. The Supreme Court of Illinois having decided that the state law, and the acts done pursuant thereto, did not violate the contract made with Wiggins, and that it was not opposed to the Constitution of the United States, that court proceeded, by a final decree, to dissolve an injunction granted *nisi*, and to dismiss the bill. To reverse this decree, on the grounds stated, a writ of error has been prosecuted to the Supreme Court of Illinois, from this court, under the twenty-fifth section of the Judiciary Act of 1789.

The contract relied on by the defendants was made with Wiggins, by two acts of the legislature of Illinois. The first act, approved March 2d, 1819, authorizes Samuel Wiggins, his heirs and assigns, to establish a ferry on the east bank of the River Mississippi, near the town of Illinois, and to run the same from lands "that may belong to him;" provided that said ferry should be put into actual operation within eighteen months from and after the passage of that act. And it was also provided by the second section, that no other person should thereafter establish any ferry within one mile of that established by Wiggins, with this reservation:—"That if the provisions of the second section of this act shall be made to appear to the General Assembly to be injurious to the public good, that then, and in such case, the second section may be repealed." Wiggins had no land of his own on the river near the town of Illinois when the above act was passed; but within less than eighteen months, he acquired an

interest in a tract of land of one hundred acres, part of which lay between Illinois town and the river, and extended to a considerable distance above it; and on this tract he established his ferry.

On the 6th of February, 1821, Samuel Wiggins had another act passed in his favor by the legislature of Illinois, authorizing him to make a turnpike road, to commence on the Mississippi River opposite to St. Louis, on lands that "may belong to him," and to run across the American bottom to the bluffs. The act further provides:—"And whereas the said Samuel Wiggins, his heirs and assigns, were authorized to establish a ferry upon the waters of the Mississippi River, near the town of Illinois, in this state, and a sand-bar having been formed since that time opposite said ferry, therefore:—

"SEC. 5. Be it further enacted, that the said Samuel Wiggins, his heirs and assigns, be, and they are hereby, authorized to remove said ferry on any land that may belong to him or them on the said Mississippi River, under the same privileges as were prescribed by the act entitled, 'An act to authorize
*581] Samuel *Wiggins to establish a ferry upon the waters of the Mississippi,' approved March 2d, 1819."

By an act approved January 19th, 1833, so much of the acts of 1819 and 1821 as prohibited another ferry from being established within one mile of Wiggins' ferry-landing, was repealed. This restriction is, therefore, out of the case.

On the 13th of July, 1822, Wiggins obtained, by purchase from Julia Jarrot, a tract of one hundred acres lying below the tract first acquired, adjoining thereto on the south, and fronting on the river; and it is upon this tract that the new ferry and road were located under the act of 1839. The parties respectively assume, and so the court below held, that the establishment and regulation of ferries across navigable streams is a subject within the control of the government, and not matter of private right; and that the government may exercise its powers by contracting with individuals. We deem this general principle not open to controversy; and in regard to so much of the controversy as involves the contract itself, no material difficulty exists as to what principles of law shall govern: only two general principles need be invoked in construing the acts of 1819 and 1821, which are,—First, that in a grant, like this, designed by the sovereign power making it to be a general benefit and accommodation to the public, the rule is, that, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the government; and therefore should not be extended by implication in favor of the grantee, beyond the natural and obvious

meaning of the words employed; and if these do not support the right claimed, it must fall. Such is the established doctrine of this court, as was held in the case of *The Charles River Bridge* v. *The Warren Bridge*, 11 Pet., 544–547. Secondly, if the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant, if, in such case, one interpretation would render the grant inoperative, and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted.

Testing the contract by these rules, and what are the complainants entitled to, under the acts of 1819 and 1821? By the first act, Wiggins was to establish the ferry near the town of Illinois, "and to run the same from lands at said place which may belong to him." At the time the act was passed, Wiggins owned no land near the town of Illinois, and if the grant was in the present tense, and extended only to land *that was then the property of the grantee, the [*582 act of Assembly had no operation, and was worthless. But we suppose the words employed were not restricted to the time when the act was passed; the grantee was allowed eighteen months to put the ferry into operation, and he was to run his boats from his own lands, that is, from lands which might belong to him at the time the running commenced; and for this there was great reason, as the opposite shore lay within another state, and there, also, a ferry-landing had to be secured. The matter was one of speculation; and lands could not, with propriety, be purchased at high prices before the privilege was secured on both banks. And this construction, as we apprehend, is the one that the legislature of Illinois put on the act of 1819 by that of 1821; by which it was admitted that a ferry had been established according to the first act, and the grantee was authorized to remove it to another point, because a sand-bar had been formed in front of the landing. We therefore feel ourselves constrained to differ from the carefully prepared and able opinion of the Supreme Court of Illinois, found in the record, which holds the first grant to have been inoperative.

We come next to consider the act of 1821. When it was passed, Wiggins had land fronting on the river for nearly a mile, extending both above and below Illinois town, and lying between it and the river. It was all the land he then could desire for the purposes of his ferry and the end of his road. Indeed, it is doubtful whether, under the grant, Wiggins

could have gone below his first purchased tract and been "near the town of Illinois," because his land extended considerably below the town. As the act of 1821 recognized the fact that Wiggins had complied with his contract under the act of 1819, and had established a ferry on land that belonged to him, and that it was established "near the town of Illinois," it is fair to presume that both parties to the contract, as modified and enlarged by the act of 1821, understood what land it was that Wiggins owned at that time, and the boundaries thereof; and also the extent of his interest, being two sevenths of the tract.

The act of 1821 was treated by the bill, and was relied on in argument, as conferring a perpetual privilege on Wiggins, and on his assigns, to remove the ferry to any land that might belong to him, or to them, at the time of the removal; and, furthermore, that the right of removal was unrestricted as respects time, and could have been made at any time heretofore, or could be made hereafter.

That the act is somewhat obscure, in regard to the place to *583] which the ferry could be removed, must be admitted; and in *seeking its true construction, several considerations present themselves. In the first place, that the act operated in the present tense, and was a mere enlargement of the privileges conferred by the act of 1819, and must be taken as a part of the first contract, cannot be denied; secondly, when we take into consideration the fact that Wiggins had a specific tract of land at that time, at the proper place,—that is to say, lying in front of Illinois town, and extending above and below it,—a reasonable conclusion is, that some place on such tract was referred to by the act of 1821; and, thirdly, as the act of 1819 reserved authority in the legislature to repeal so much of the law as secured to Wiggins an exclusive ferry right for two miles on the river front, such reservation could only mean that rival ferries might be established, at discretion, by the legislature. Nor can it be assumed, with any claim to a plausible construction, that the power of removal had no limitation of time or place, as this would confer a right to remove to the same landing with a newly established ferry, set up as a rival, and drive it away; and thus the public convenience would again be reduced to a single ferry. Now, in view of these facts and consequences, and applying them to language of an ambiguous character, and seeking assistance from a settled rule of construction in case of doubt, and finding that rule of construction to be, that when two constructions are equally open to the court, the one shall be adopted most favorable to the government, the consequence

must be, on this construction, that Wiggins was confined to the tract of land partly owned by him when the act of 1821 was passed; and that when the ferry was removed to other land, lower down the river, it was an act not within the contract, nor protected by it. This disposes of the first and principal ground of relief sought by the bill.

Whether Wiggins, or those claiming under him, had the right after he had established his new ferry, under the act of 1821, to remove it to another place on the tract of land he then owned, and whether the state of Illinois may not authorize another ferry on the same tract of land, not interfering with the operations of the one established by Wiggins, are questions which the record does not bring before us, and upon which, therefore, we express no opinion.

A second ground of relief is relied on by the bill, and was most earnestly and ably urged in argument here, and which it is incumbent on us to dispose of also.

The first special prayer would seem to conclude an inquiry into any ground of interference by this court, other than the *question arising on the acts of 1819 and [*584
1821, standing as a contract, claimed to have been violated by the act of 1839. But the bill has also a general prayer; and on this, as well as upon the special prayer, the Supreme Court of Illinois ordered, "that it be certified in this case, that there was drawn in question the validity of the statute of the state of Illinois entitled, 'An act to authorize St. Clair county to establish a ferry across the Mississippi River,' approved March 2, 1839, on the ground that it was repugnant to the Constitution of the United States, and that the decision of the court was in favor of the validity of said statute;" from which certificate it is manifest that the act of 1839 was upheld against each state of facts set forth by the bill; and if it was apparently repugnant to the Constitution on either ground assumed, this court has jurisdiction of the cause; and having jurisdiction, the plaintiffs in error were entitled to be heard, and are entitled to our judgment, on both grounds presented, and relied on to reverse.

The bill sets forth that gross abuses were imposed on complainants by the act of 1839, and by the commissioners and their lessee, under the act; that the said three hundred feet include a wider space, and more land, than is necessary or convenient for a road, and but a small portion of it has been used and appropriated by the said county of St. Clair to that purpose, leaving a strip on either side to be used by the said county of St. Clair and its lessees, for private property, for building lots, and other private purposes; and that that por-

tion of the said three hundred feet which is not included in said road, and which is now used for private purposes, or is left to be thus used, will yield an annual ground rent larger than the whole amount of the damages assessed as aforesaid for the whole of said three hundred feet; and furthermore, that only the condemned land was valued, and no compensation awarded or tendered for the ferry franchise and landing taken from complainants.

As the bill was demurred to, and the demurrer sustained in the state courts, and in this form the case comes before us, all charges of abuse and oppression on the part of the authorities of Illinois are admitted, to the extent alleged; and the question presented here on these facts is, whether this court has power to redress the injuries complained of, under the twenty-fifth section of the Judiciary Act of 1789.

The Constitution having declared that no state shall pass any law impairing the obligation of contracts, it becomes our duty to inquire whether the state law, and the acts done under it, violate a contract. If any contract was violated *585] under the *act of 1839, it must have been a grant to land vesting the fee simple title; and such title complainants exhibit. To the width of needful roads and ferry-landings, property can undoubtedly be taken, for the purposes of such easements; and necessarily, the state authorities must decide (as a general rule) how much land the public convenience requires. That the power may be abused, no one can deny; and that it is abused, when private property is taken, not for public use, but to be leased out to private occupants to the end of raising money, is too plain for reasoning to make it more so. Such an act is mere evasion, under pretence of an authorized exercise of the eminent domain; and if it be an evasion, it is void, and may be redressed by an action at law, like any other illegal trespass, done under assumed authority; as, for instance, a trespass by a younger grantee on land held by an elder patent depending for support on a state law of later date than the first grant. But it is not an invasion and illegal seizure of private property on pretence of exercising the right of eminent domain, and which act is an abuse claiming the sanction of a state law, that gives this court jurisdiction; such law, and the acts done under it, are not, "the violation of a contract," in the sense and meaning of the Constitution. It rests with state legislatures and state courts to protect their citizens from injustice and oppression of this description. The framers of the Constitution never intended that the legislative and judicial powers of the general government should extend to municipal regulations

necessary to the well-being and existence of the states. Were this court to assume jurisdiction, and re-examine and revise state court decisions, on a doubtful construction, that an interest in land held by patent was a contract, and the owner entitled to constitutional protection by our decision in case of abuse and trespass by an oppressive exercise of state authority, it would follow, that all state laws, special and general, under whose sanction roads, ferries, and bridges are established, would be subject to our supervision. A new source of jurisdiction would be opened, of endless variety and extent, as, on this assumption, all such cases could be brought here for final adjudication and settlement; of necessity, we would be called on to adjudge of fairness and abuse to ascertain whether jurisdiction existed, and thus to decide the law and facts; in short, to do that which state courts are constantly doing, in an exercise of jurisdiction over peculiarly local matters; by which means a vast mass of municipal powers, heretofore supposed to belong exclusively to state cognizance, would be taken from the states, and exercised by the general [*586 government, *through the instrumentality of this court. That such a doctrine cannot be maintained here has in effect been decided in previous cases; and especially in that of *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 539, 540, where other cases are cited and reviewed.

For the reasons above stated, it is ordered that the judgment of the Supreme Court of Illinois be affirmed.

Mr. Justice McLEAN dissented.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the state of Illinois, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed, with costs.

JOSEPH J. KENNEDY, TRUSTEE OF HENRY SHULTZ, AN INSOLVENT DEBTOR, AND FOR THE CREDITORS OF THE SAID HENRY SHULTZ, AND HENRY SHULTZ, APPELLANTS, *v.* THE BANK OF THE STATE OF GEORGIA, THE CITY COUNCIL OF AUGUSTA, JOHN MCKINNE, AND GAZAWAY B. LAMAR.

Some of the distinctions stated between bills of review, of revivor, and supplemental and original bills in chancery.

This court, as an appellate court, has the power to allow amendments to be made to the record before it, although the general practice has been to remand the case to the Circuit Court for that purpose.[1]

When a cause is brought before this court on a division in opinion by the judges of the Circuit Court, the points certified only are before it. The cause should remain on the docket of the Circuit Court, and at their discretion may be prosecuted.[2]

If the jurisdiction of a Circuit Court be not shown in the proceedings in the case, its judgment is erroneous, and liable to be reversed; but it is not an absolute nullity.

But when an amendment to the record was made by consent of counsel in this court, which amendment set forth the jurisdiction, a mandate containing that amendment ought to have prevented any subsequent objection to the jurisdiction in the Circuit Court.[3]

A decree for a sale, made with the approbation of counsel filed in court, removes all preceding technical objections.

Where a party interested consented to the sale of property, afterwards took the benefit of the insolvent law, and at a subsequent period counsel representing him filed a consent decree to complete the sale, the trustee having taken no steps for two years to connect himself with the proceedings in court, and then having suffered fifteen years more to elapse without moving in the business, it is too late for such trustee to object to the consent decree.

So, also, the holders of bridge bills, who had no specific lien upon a bridge, must be considered to have lost their right to impugn the sale as fraudulent, after so long a lapse of time.

*587] *THIS was an appeal from the Circuit Court of the United States for the District of Georgia, sitting as a court of equity.

As the decision of the court turned upon some collateral points, it is not necessary to state all the facts in the case, which were extremely complicated. The Reporter therefore refers the reader to the opinion of the court, which was delivered by Mr. Justice McLean, and which contains a recital of all the facts necessary to an understanding of the points decided.

It was argued in conjunction with another case between the same parties, involving the same principles of law, and

[1] QUOTED. *Udall* v. *Steamship Ohio*, 17 How., 18.

[2] FOLLOWED. *Ward et al.* v. *Chamberlain et al.*, 2 Black, 434. CITED. *Daniels* v. *Railroad Co.*, 3 Wall., 255.

[3] CITED. *Holmes* v. *Oregon &c. R. Co.*, 9 Fed. Rep., 237; s. c., 7 Sawy., 392.

with nearly the same state of facts. The two cases were argued by *Mr. Waddy Thompson*, *Mr. Butler*, and *Mr. Webster*, for the appellants, and, upon the part of the appellees, by *Mr. Davis*, representing Lamar, *Mr. McAllister* and *Mr. Johnson* (Attorney-General), representing the bank, and *Mr. Sergeant*, representing the city of Augusta.

The arguments of the counsel continued for several days, and it is therefore impossible to give a full report of them, or to do more than merely state the points and authorities.

The points raised on behalf of the appellants were the following, as stated in the briefs of *Mr. Webster* and *Mr. Thompson*.

On the 9th day of May, 1821, one Christian Breithaupt and the said Henry Shultz filed their bill in the Circuit Court against the Bank of the State of Georgia, praying that the bridge across the Savannah River at Augusta, and other property therein named, might be decreed to be first liable to the redemption of the bills issued by the Bridge Company aforesaid, and for an injunction restraining the Bank of Georgia and other creditors of the said John and Barna McKinne, as well as the creditors of the said Bridge Company, from enforcing executions and selling the bridge and other property of the said Bridge Company.

Amongst various interlocutory orders in said cause, was one ordering the bridge aforesaid to be sold by two commissioners therein named; and it was sold accordingly, and the Bank of the State of Georgia became the purchaser. The said Henry Shultz consented to the sale in writing; but the said John McKinne refused to give such assent.

On the 6th of May, 1830, a decree, drawn up by the consent of counsel, was signed by the Hon. W. Johnson and J. Cuyler, which will be found in the record.

It is alleged by the present complainant, the assignee of Henry Shultz, that the order of sale aforesaid is not binding, in *so far as those whom he represents are concerned. [*588
First, because John McKinne, the joint tenant of the said Henry Shultz, refused his consent. And secondly, that the creditors of the Bridge Company were not parties to said suit; and that the decree of the 6th of May, 1830, presents no bar to the claim of your orator, John W. Yarborough,[1] as it purports on its face to have been made by the consent of the counsel of the said Henry Shultz, two years after he had

[1] Yarborough was the original trustee of Shultz, in whose place Kennedy was now acting.

made an assignment of all his estate, and specifically of the bridge aforesaid, to Thomas Harrison, for the benefit of his creditors, and therefore he had no power or authority in the premises, and also because the court had no jurisdiction of the cause.

The bill prays that the bridge and other property of the Bridge Company may be decreed to be first liable for the redemption of the bills issued by the said Bridge Company, and afterwards to refund the creditors of Henry Shultz the amount, with interest, which he paid for the redemption of said bills after his retirement from the Bridge Company.

To this bill of complaint John McKinne answers, admitting all the material allegations of the bill. The other defendants filed demurrers.

The complainant submits to this honorable court, that the sale of the bridge, by the interlocutory order of the court, is void as to him, and those whom he represents, the creditors of Henry Shultz, who were not parties to the suit. 2. That the said sale was made without the consent of the said John McKinne. 3d. That the court, at the time of the said order, had no jurisdiction of the case, as proper parties were not before the court.

2. That the consent decree of the 6th of May, 1830, has no binding efficacy on the complainant or those he represents, as they were not parties in said suit, and that the consent of the said Henry Shultz was without authority, as regards the claims of his creditors, as he had previously assigned all his interest in the premises, under the insolvent debtor law of South Carolina, to Thomas Harrison, Esq.; and because the court had not jurisdiction of the case.

3. That the mortgage by John and Barna McKinne to the Bank of Georgia was void, as violating a statute of Georgia, and secondly, as appropriating the assets of the partnership to the payment of the individual debts of the partners, in violation of the general law on that subject, as well as the special terms of this particular copartnership.

*589] 4. *That if the said mortgage be valid, the defendants, never having foreclosed, are to be regarded as mortgagees in possession, and chargeable with rents, issues, and profits.

5. That if the court should be of opinion that, as regards the interest of the said Henry Shultz, the sale made under the interlocutory order aforesaid be valid, it is void as to the interests of the said John McKinne, the joint owner of said bridge.

6. That the mortgage, if a valid lien, has been more than

paid off, and the residue is subject to division amongst the creditors of Henry Shultz.

7. That a release by the Bank of Georgia to John McKinne, one of the two joint owners of the bridge, and partners with the Bridge Company, is, in law, a release of the said Henry Shultz.

The following authorities will be relied on in the argument: —3 Ves., 255; 2 Kent Com., 400; 2 Story Eq., 304, §§ 446–449, 463, 1039, 1040; Jac. Law Dict., tit. *Estate;* 3 Mod. 46; 2 Story Eq., 527, §§ 1287, 240, 976; 2 Treadw., (S. C.), 674; 3 Taunt., 976; 2 Story Eq., 491, § 1244; Mill on Eq. Mort., 123; Law Lib., 47; 1 Story Eq., 383, § 395; Mill on Eq. Mort., 76, 79, 80, 81; 1 Story Eq., 625, § 675; 2 Id., 500, § 1253; 3 Kent Com., 65; 1 Story Eq., 588, § 633; 3 Laws United States, 482, § 6; 10 Wheat., 1, 20; 2 Cranch, 33; 3 Wheat., 591; 2 Marsh (Ky.), 11; 1 Bland (Md.), 20; 6 Leigh (Va.), 400; Story Eq., § 10; 13 Pet., 691, 729; 8 Cranch, 9, 22; 2 Pet., 157, 163; 10 Pet., 449, 475; 10 Wheat., 199; Gov. Deg. 974–976; 9 Pick. (Mass.), 259; Story Eq., §§ 329, 330, 349, 380, 403, 425, 354; Mitf. Eq. Pl., by Jeremy, 97, 98; 7 Paige (N. Y.), 287, 290; Story Eq., §§ 466, 499, 500, 503, 505, 507, 508, 513, 519, 521, 526; Barton Suit in Eq., 131; 1 Pet., 329; 2 T. R., 282; 4 Ves., 396; 3 Atk., 809, 811; 5 Ves., 3; 2 Stat. at L., 159 and *n.*; Story Eq. Pl., 443; 1 Ves. & B., 536; 19 Ves., 184; 2 Story Eq. Jur., 1520 and *n.*; 1 Pet., 329; 10 Id., 480; 11 Wheat., 1.

Mr. Davis contended, on behalf of Lamar, that the Bank of the state of Georgia was a purchaser at a judicial sale, under a decree of a court having jurisdiction of the cause, the parties, and the subject-matter,—the sale being unimpeached for either fraud or irregularity, and so entitled to the bridge, and to convey it to Lamar.

To this it is replied, in substance, that the decree was erroneous, considered as pronounced *in adversum.*

Lamar rejoins,—

I. That the decree of the 21st of December, 1821, [*590 was by *consent of all parties in interest,—Shultz and McKinne, joint owners and partners, the bank as mortgagee, and Breithaupt and others, creditors of said Shultz; and,—

1. That they and all claiming under them are estopped, by such consent, to insist on error in the decree. *Webb* v. *Webb*, 3 Swanst., 658; *Bradish* v. *Gee*, Amb., 229; 2 Dan. Ch. Pr., 617; *Downing* v. *Cage*, Eq. Cas. Abr., 165, § 4; *Toder* v. *Sansam*, 1 Bro. P. C., 469, 473, 476; *Harrison* v. *Rumsey*, 6 Ves., Sr., 488; *Wall* v. *Bushby*, 1 Bro. Ch., 484, 485, 489; *Norcot*

v. *Norcot*, 7 Vin. Abr., 398; *Bernal* v. *Donegal*, 3 Dow., P. C., 133; *Mole* v. *Smith*, 1 Jac. & W., 665.

2. That there is no sufficient averment that McKinne did not consent to the decree of December, 1821, but only that he never consented to, or executed any power or authority to the commissioners to make said sale, or to execute any title to the purchaser; and that, after consent to the decree, his objection could not stop the sale, nor was a power of attorney requisite. *Bradish* v. *Gee*, Amb., 229; *Webb* v. *Webb*, 3 Swanst., 658.

3. The language of the bill, on the contrary, imports an express averment that the decree was in fact made "by consent of the parties, complainants and defendants."

4. Were there a direct denial, still a party cannot controvert the consent recited in the decree,—unless, perhaps, for fraud in its insertion. *Downing* v. *Cage*, Eq. Cas. Abr., 165, § 4; *Norcot* v. *Norcot*, 7 Vin. Abr., 398; *Mole* v. *Smith*, 1 Jac. & W., 665; *Biddle* v. *Watkins*, 1 Pet., 686.

5. *A fortiori*, not as against a purchaser under the decree, such party never having objected to the decree or sale, nor moved to have the "consent" stricken out, though before the court always, after twenty-four years from the decree of sale, and fifteen from its formal ratification and final decree. *Voorhees* v. *Bank of United States*, 10 Pet., 449, 473; *McKnight* v. *Taylor*, 1 How., 161; *Lupton* v. *Janney*, 13 Pet., 385.

6. McKinne not seeking as complainant the avoidance of the decree and sale on that ground, Shultz cannot avail himself of the error, as against McKinne, to enable him to avoid his own consent and acts. *Thomas* v. *Harvie's Heirs*, 10 Wheat., 146; 6 Cond. R., 44, 47; *Whiting* v. *Bank of United States*, 13 Pet., 6.

II. If the denial be adequate and allowable in itself, and available for Shultz, still,—

1. No error, or omission, or false recital, or want of proof, or other error behind or on the face of the decree, the court having jurisdiction, can affect a purchaser under it. *Simmes* *591] *Wise* v. *Slacum*, 3 Cranch, 300; 1 Cond. R., 539, 541; *Thompson* *v. *Tolmie*, 2 Pet., 157, 167, 168, 169; *United States* v. *Arredondo*, 6 Pet., 729; *Bank of United States* v. *Bank of Washington*, Id., 8, 16; *Voorhees* v. *Bank of United States*, 10 Id., 449, 472, 478; *Shriver's Lessee* v. *Lynn*, 2 How., 48, 58; *Grignon's Lessee* v. *Astor*, Id., 319, 340–343; 10 Wheat., 192, 199; 6 Cranch, 267.

2. The denial of the consent is such,—for consent is in lieu of evidence or law authorizing such a decree; and it is to deny a fact recited as the foundation of the decree; and if it be as recited,—a sufficient foundation for it.

3. The inference, that McKinne's refusal avoided the whole sale, impeaches the judgment of the court, ordering and confirming the sale in spite of such want of consent; i. e. the court erred in decreeing, upon consent of one, the sale of the whole, or of any part of the bridge.

4. The allegation of the invalidity of the mortgage to the bank is likewise controverting the opinion of the court, that it was valid, so far as to authorize a sale, or it is entirely irrelevant.

So none of them avail, to impeach the title of the bank or of Lamar. 2 How., 43, 58; 2 Pet., 168; 10 Id., 472, 473; *Bennett* v. *Hamill*, 2 Sch. & L., 577, 578.

The denial of the consent recited does not show the decrees to be nullities; the consent is not the decree, but only waiver of objection to it; the decree is the act of the court,—valid as a decree on the subject-matter till reversed, in spite of the want of consent. So denial of consent removes that estoppel, only against showing errors in the decree.

III. The absence of McKinne's consent would not avoid the sale of the bridge.

1. (*a*) The parties had a chattel interest, an estate for years only, in the franchise.

(*b*) It was partnership property, and therefore one partner could dispose of the whole interest, so as to bind his copartner. *Harrison* v. *Sterry*, 5 Cranch, 289; 2 Cond. R., 260–263; *Anderson* v. *Tompkins*, 1 Brock., 456; *Robinson* v. *Crowder*, 4 McCord (S. C.) L., 519.

(*c*) McKinne being party to the suit with his copartner, and having never moved to avoid the sale, has, by his acquiescence and knowledge, ratified his partner's act. *Storrs* v. *Barker*, 6 Johns. (N. Y.) Ch., 166, 169, 172; *Wendell* v. *Van Rensselaer*, 1 Id., 354.

(*d*) McKinne is barred by lapse of time from avoiding the sale for want of his consent; and so are Shultz and his assignee, when relying on McKinne's refusal.

*2. The supposed pledge of the bridge is a legal [*592 nullity; for,—

(*a*) It was, if any thing, a private understanding merely of the partners, that this fund should remain as security for the bills, which did not affect their power of disposal, as to third parties. *Hawker* v. *Bourne*, 8 Mees. & W., 710.

(*b*) If publicly notified, it gave no lien on the bridge passing with the notes into each holder's hands.

(*c*) There is no direct averment of any legal pledge creating a lien on the bridge for holders of bridge bills, before other social creditors; nor of any disposition of, or agreement

[illegible]

with reference to the bridge, concerning the power of both or either of said [illegible] and as to the application of its proceeds.

(c) It must follow against Smith's consent and sale of his interest in said bridge that the assignment of his share under the State statutes inures to—and so the trustee has an interest in the suit.

IV. The suit being regular, passed the whole interest of Smith in the property; and—

1. In maintaining this McKinne also.

(a) It was virtually dismissed by payment and acceptance of the purchase-money and possession of the bridge; all which were assented to.

(b) By express decree.

(c) Both Smith and McKinne are estopped from alleging error by consent to the decree. (See cases cited above.)

(d) There is no suggestion that the counsel of "defendants" assenting thereto did not then represent McKinne.

(e) Even as to Smith, it is not averred that his solicitor had ceased to be such; but only that he by his consent could not bind the fund nor the interests of the creditors.

2. This decree is not shown to be void by any sufficient averment; for,—

(a) Being by consent, without dispute, no error can be alleged against it other than such as shall go to the jurisdiction of the court which gave it.

(b) This decree was rendered by the Circuit Court in which the suit was brought; and it is not averred that it had not jurisdiction.

(c) The denial of jurisdiction in the Supreme Court does not involve the denial of that of the Circuit Court, nor show that its decree is void; for on certificate of division, the points certified alone are before the Supreme Court; the cause
*593] remains below, and may be proceeded in there. 2 Stat. at L., p. *159, § 6; *Ogle* v. *Lee*, 2 Cranch, 33; *Harris* v. *Elliot*, 10 Pet., 25, 56; *Davis* v. *Bradin*, Id., 286, 289; *Adams & Co* v. *Jones*, 2 Id., 207, 213, 214; *White* v. *Turk*, 12 Id., 239, 240; *United States* v. *Baily*, 9 Id., 267, 273, 274; *Perkins* v. *Hart*, 11 Wheat., 237; *Wayman* v. *Southard*, 10 Id., 1; *United States* v. *Briggs*, 5 How., 208.

Therefore, if the Supreme Court had jurisdiction, the cause was regularly remanded, and it was competent for the Circuit Court to render any decree it saw fit. If the Supreme Court had not jurisdiction, the cause remained before the Circuit Court, with like power of proceeding to decree.

(d) But the facts averred do not show that the Supreme

Court had not jurisdiction at January term, 1830; for though its opinion was ordered to be certified, it had not been done; and till it had been done, it was competent for counsel to ask for its reinstatement by consent.

It was also within their power to agree to, and of the court to allow, an amendment of the pleadings, not stating new points, but obviating obstacles to the decision of those certified. *Bank of Kentucky* v. *Ashley*, 2 Pet., 327, 328, 330; *Woodward* v. *Brown and Wife*, 3 How., 1, 2; *Union Bank of Georgetown* v. *Geary*, 5 Pet., 99, 111, 113; *Holker* v. *Parker*, 7 Cranch, 436, 456; *Osborn* v. *Bank of United States*, 9 Wheat., 738; *Jackson* v. *Stewart*, 6 Johns. (N. Y.), 34, 37, 296, 300; *Henck* v. *Todhunter*, 7 Har. & J. (Md.), 275, 278.

The order of January term, 1828, was predicated on "the present state of the pleadings," and contemplated an amendment; and it could as well be allowed before the Supreme as the Circuit Court. *Matheson's Adm.* v. *Grant's Adm.*, 2 How., 263, 281; *Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206.

(*e*) The Supreme Court having assumed jurisdiction, allowed the reinstatement, and certified the cause below for further proceedings, it is not competent for any party or court to impeach its jurisdiction. *Voorhees* v. *Bank of United States*, 10 Pet., 474; *Martin* v. *Hunter's Lessee*, 1 Wheat., 104; *Ex parte Sibbald* v. *United States*, 12 Pet., 492; *Washington Bridge Co.* v. *Stewart et al.*, 3 How., 413, 424, 426; *Skillern's Exec.* v. *May's Exec.*, 6 Cranch, 267.

If, then, the decree of 1830 be not void, but valid as to all parties to it, then,—

1. McKinne is expressly bound by it.

2. It ratifies the sale, and thus removes all difficulty arising from McKinne's previous supposed dissent; and,

3. Thus Shultz being bound by the sale, and McKinne by *the ratification, the whole interest in the bridge is concluded by consent decrees. [*594

V. The confirmation by final decree was not vitiated by failure to bring Shultz's assignee before the court; for

1. The decree for sale was final and conclusive on Shultz's whole interest. *Ray* v. *Law*, 3 Cranch, 179; *Whiting* v. *Bank of United States*, 13 Pet., 6, 15.

2. The sale was merely execution of the decree, and confirmation was the right of the purchaser, and of course, in the absence of cause shown.

3. No cause is shown in this record, no irregularity or fraud, nor any grievance to the complainants' assignee.

And the confirmation pending the abatement or defectiveness of the suit by reason of the assignment and the absence

of the assignee is not even in which a bill of review will lie, unless the suit be dismissed. *Thomas* v. *Harvie's Heirs*, 10 Wheat., 146. *Whiting* v. *Bank of United States*, 13 Pet., 13, 14.

4. There were always parties before the court competent to sue; for in the assignment the suit was not abated but continued, and could be proceeded with if neither party moved the assignee to be brought before the court and he did not come in. Story's Eq. Pl., § 355; *Seymour* v. *Cleveland*, 7 Paige (N. Y.), 287, 290, 291, 292; *Mosely* v. *Gaston*, 1 Hen. & M., 144.

Stark was still a necessary and proper party, and could for his own interest submit to the reinstatement and the amendment—especially if assignee declined or neglected to proceed with the suit. *Seymour* v. *Cleveland*, 7 Paige (N. Y.), 290; Mitf. Eq. Pl. by Jer., 65, n. 1.

This assignment being out of the state where the suit was pending, if considered as made under a tribunal and law operating *in invitum*, cannot operate on the fund in the hands of the Circuit Court extra-territorially. *Harrison* v. *Sterry*, 5 Cranch, 289; *Blane* v. *Drummond*, 1 Brock., 62.

If voluntary, the assignee is bound by all proceedings before he is made party. Story Eq. Pl., § 351; Mitf. Eq. Pl. by Jer., 73, 74.

VI. This is a bill of review to vacate a decree, and to have the benefit of the proceedings.

It is therefore barred by lapse of more than five years from the final decree, whether the decree of December, 1821, or May, 1822, or May, 1830. *Thomas* v. *Harvie's Heirs*, 10 Wheat., 146; *Whiting* v. *Bank of United States*, 13 Pet., 13, 15.

And treating the decree of December, 1821, and May, 1822, as final, by lapse of twenty years and laches and negligence.

*595] *VII. But, in fact, it appears that Lamar is not the purchaser of anything that ever was the property of complainants.

The right claimed was a franchise to have a toll-bridge over a navigable river, held by acts of the legislatures of South Carolina and Georgia, for a limited time, which had expired when Lamar purchased the bridge, which then was held under a new grant. Laws of Georgia, for 1833, p. 40, 41, tit. *Bridges*; 9 Statutes of South Carolina, 589, § 24; 471, 472, § 53; Act of Georgia, December 28, 1840.

The record of the original cause, being in the Supreme Court, under the certificate of division, and being referred to

in the bill, may be inspected. *Bank of United States* v. *White*, 8 Pet., 262, 268.

The franchise in this case was an incorporeal hereditament granted for a term of years to the grantees and their heirs, and could only exist by virtue of the acts of Assembly, and ceased on the expiration of the time limited. 2 Bl. Com., 37, 38; 2 Inst., 220; *Bank of Augusta* v. *Earle*, 13 Pet., 595; *People* v. *Thompson*, 21 Wend. (N. Y.), 235, 249, 250; 23 Id., 537, 554, 564, 569.

That this franchise and the statute creating it are public in their nature. 9 Bac. Abr., 231, 232; 21 Wend. (N. Y.), 235, 249, 250; 15 Johns. (N. Y.), 387, 389; Gresley on Eq. Ev., 293, 294; 1 Stark. on Ev., 196.

The points made by *Mr. McAllister* and *Mr. Johnson* were the following:—

1st. That the present bill of revivor and supplement has not been exhibited in accordance with the practice and usages of courts of equity, and on that ground the demurrer must be sustained. Story Eq. Pl., § 643; 1 Dan. Ch. Pr., 649; *Wortley* v. *Birkhead*, 3 Atk., 809, 811; *Fletcher* v. *Tollett*, 5 Ves., 3.

2d. That the present bill was filed without leave of the court and notice to the adverse party, on the erroneous supposition that the original suit, the revival of which is the object of the present bill, had abated, whereas, by complainants' own showing, it had only become defective, and, in such case, the court had no jurisdiction of the bill without previous leave given to file it, and due notice to the opposite party of the intention to file such bill, in compliance with the 57th Rule of Practice of the courts of equity of the United States. 1 How., xviii.; 17 Law Lib., 112; Story Eq. Pl., § 383, *n.* 3; 1 Dan. Ch. Pr., 75; *Sharp* v. *Hullett*, 2 Sim. & Stu., 496; *Pendleton* v. *Fay*, 8 Paige (N. Y.), 206; *Whitney* v. [*596
**Bank of United States*, 13 Pet., 13; 3 Dan. Ch. Pr., 1733, 1737; 2 Ves., Sr., 571, 577; *Dexter* v. *Dexter*, 4 Mason, 304; Story Eq. Pl., §§ 466, 527, 528, 443; 1 Dan. Ch. Pr., 449, 625, 655; 4 Paige (N. Y.), 639.

3d. That where two complainants exhibit their bill, both must have an interest in the subject-matter of dispute, or else the demurrer will be sustained. Story Eq. Pl., §§ 232, 509, 544; 1 Dan. Ch. Pr., 347, 348, 361, 362, 617; *The King of Spain* v. *Machado*, 4 Russ., 225, 242; *Abrahams* v. *Plestoro*, 3 Wend. (N. Y.), 546.

4th. That, by their own showing, neither of the complain-

ants in this case had such an interest as would authorise the filing of the present bill.

1. As to Henry Shultz. His interest is concluded by the decree of 8th May, 1839, entered into by consent of his attorney, who was the attorney of record. *Union Bank of Georgetown* v. *Geary*, 5 Pet. 112, 113; *Braddick* v. *Gee*, Amb. 229; 5 N. H. 393; 4 Mun. (Ky.), 377; 2 N. H. 520; 1 H. Bl. 21; 17 Johns. (N. Y.), 461; 15 Mass. 395; 7 Cow. (N. Y.), 744.

2. That against this consent decree, no error can be alleged by him. *Harrison* v. *Rumsey*, 2 Ves. Sr. 488; *Monell* v. *Lawrence*, 12 Johns. (N. Y.), 534; *Webb* v. *Webb*, 3 Swanst. 658; Bro. Parl. Cas. 244; 2 Dan. Ch. Pr. 1172, 1180.

3. That he is concluded by his acquiescence in this decree, from its date to 9th May, 1845, when present bill was filed.

4. That he is concluded, by his letters of attorney to Walker and Fitzsimmons, authorizing them to sell the Augusta Bridge, his consent to such sale, its sale under a power from him, and the subsequent confirmation of said sale by the consent decree.

5. That present bill does not allege that Shultz is not concluded by said decree, but simply affirms that all his interest in the subject-matter had passed out of him, prior to the consent given to said decree by the solicitor of him, the said Henry Shultz, and that therefore said decree could not bind his (the said Shultz's) creditors and assignees.

Thus much for Shultz.

5th. As to the other complainant, John W. Yarborough, he has no interest.

1. He was not the assignee of Shultz, under the insolvent law of South Carolina. By the allegations of the bill, it appears he was merely a trustee, appointed by a court of equity in that state to distribute the funds in that court belonging to an insolvent party. Such court did not, and could not, assign to the trustee the right to sue for money at
*597] the time in the registry of a foreign tribunal, nor could such appointment (if it *be deemed that the bridge was unsold at the time) pass real estate situate in Georgia. James's Dig. Laws S. C., 121; 2 Hill (S. C.), 468.

2. Admitting, *ex gratia*, that Yarborough was assignee, duly appointed by an insolvent court, the assignment constituting him such assignee was *in invitum* in the state of South Carolina, and it could not on that ground operate a transfer of funds in the registry of the court of Georgia. Such assignment was not only *in invitum*, but was the creature of a local law of South Carolina, and could have no extra-territorial operation to pass property in Georgia. The general right of

a foreign assignee to sue may be admitted; but it will be contended, that right is based upon national comity, and is admitted only when neither the state in which he seeks to sue, nor her citizens, would suffer injury from the application of the foreign law; that the consent decree was in the nature of a settlement between debtor and a creditor without notice of change of interest, and the application of a foreign law, to the detriment of the latter, would be as unjust as it would were it permitted by its application to cut out a domestic creditor in favor of a foreign assignee. Story Eq. Pl., § 379; Sugd. on Vend., 460, 537; *Picquet* v. *Swan*, 5 Mason, 40; 1 Story Eq. Jur., § 406; Calvert's Eq., 102; *Bishop of Winchester* v. *Payne*, 11 Ves., 194, 197; 2 Ves. & B., 199, 205; Sugd. on Vend., 538; 3 Atk., 392; Baldw., 45, 296; 1 Wend. Bl. Com., 441, note; *Fenwick* v. *Sears*, 1 Cranch, 259; *Dixon's Ex.* v. *Ramsay*, 3 Cranch, 319; 1 Kirby (Conn.), 313; 6 Binn. (Pa.), 353; 1 Har. & M. (Md.), 236; 2 Hayw. (N. C.), 24; 20 Johns. (N. Y.), 227; 3 Wend. (N. Y.), 538; 2 Kent Com., Lec. 37, pp. 40, 46, 407, 408 (2d ed.); 1 Mill (S. C.), 283; 4 McCord (S. C.), 519, 367; 2 Hill (S. C.), 601; 5 Cranch, 302; 12 Wheat. 213, 356; 5 How., 295; 1 Brock., 203, 211; 9 Johns. (N. Y.), 64.

Thus much for the interest of Yarborough.

6th. It will be contended that John W. Yarborough must be a privy or a stranger to Henry Shultz. If the former, he is bound by the letter of attorney of Shultz to Walker and Fitzsimmons,—his consent to the sale of the bridge and all his previous acts,—in a word, if Yarborough was a privy, he comes in *pendente lite*, and must come in *pro bono et malo*. On the other hand, if Yarborough be a stranger, he is clearly not entitled to revive the proceedings of another for his own benefit.

Should it be urged again, as it was in the court below, that all that was done by Shultz, was done *coram non judice*, and void, we shall answer,—

1. If the proceedings were void, (which is by no means admitted,) *what was done by Shultz was good as matter of contract, having received his assent. [*598

2. If the proceedings were void, how comes it complainants seek to revive a nullity?

3. We shall contend that the proceedings were not void, and that the decree cannot be impeached in the manner attempted by the present bill.

7th. We shall argue that the assignee (the only one appointed by the insolvent court) having disclaimed, Shultz, in whom the legal title was, became by implication the trustee

of his creditors, and thus all parties were before the court at the time the decree was rendered. *Tunno* v. *Edwards*, 2 Treadw. (S. C.) 674.

8th. If none of foregoing grounds be sustained by the appellate tribunal, the bill to which demurrer has been filed will be viewed in the attitude it professes on its face to hold,—that of a bill of revivor and supplement,—and it will be contended that, the object of the bill being to revive a portion of the proceedings and to set aside the decree, the demurrer must be sustained, such not being the office of a bill of revivor and supplement. Story Eq. Pl., §§ 257, 333, 344, 354, 377, 383, 386, 617; *Pendleton* v. *Fay*, 3 Paige (N. Y.), 204, 206; 3 Dan. Ch. Pr., 1739.

9th. It will be contended that the present bill is in truth a bill of revivor and supplement, in nature of a bill of review; but as such it cannot be sustained, because such bill can only be filed within five years after decree rendered, for error of law apparent on the face of the decree, or with leave of the court upon affidavit of new facts recently discovered. Story Eq. Pl., §§ 404, 405, 407, 409, 412, 417; *Webb* v. *Pell*, 3 Paige (N. Y.), 368; *Whiting* v. *Bank of United States*, 13 Pet., 6; *Dexter* v. *Arnold*, 5 Mason, 308; 10 Wheat., 146; Story Eq. Pl., § 426; *Mussell* v. *Morgan*, 3 Bro. Ch., 79; *Style* v. *Martin*, 1 Ch. Cas., 151; *Monell* v. *Lawrence*, 12 Johns (N. Y.), 535; *Kennedy* v. *Daly*, 1 Sch. & L., 355, 374.

10th. It will be argued that the demurrer must be sustained by reason of the decree of May, 1830, the whole case being *res adjudicata*. That there was no error in said decree or the proceedings on which it was founded, which could have the effect to impeach its validity.

That admitting there was error, it was merely one of pleading, which did not vacate the decree, and giving to it the fullest effect, it could only render the decree voidable, to be set aside on appeal. Story Pl., §§ 10, 688; 2 Smith Lead. *599] Cas., 440; 1 Bibb (Ky.), 262; 2 How., 497; 1 Ill., 31; Coxe (N. J.), 31, 70; 3 *McCord (S. C.), 280; *Case of the Blaireau*, 2 Cranch, 208; *Jackson* v. *Ashton*, 10 Pet., 480; *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173; *Skillen's Ex'rs* v. *May's Ex'rs*, 6 Cranch, 267; *McCormick* v. *Sullivan*, 10 Wheat., 199; *Case of Tobias Watkins*, 3 Pet., 208; *Washington Bridge Co.* v. *Stewart et al.*, 3 How., 413; *Voorhees* v. *Bank of United States*, 10 Wheat., 473; 6 How., 39; Chancellor Harper's opinion in *Yarborough, Trustee*, and *Shultz* v. *Bank of the State of Georgia and others*, MS.; *Ex parte Bradshaw*, 7 Pet., 647. That, so far from being a nullity, the decree placed the Bank of the State of Georgia, and those

claiming under them, in the attitude of *bonâ fide* purchasers for a valuable consideration at a judicial sale, and that in favor of them the maxim of *omnia presumuntur rite acta* will apply. *Bennett* v. *Hamill*, 2 Sch. & L., 566; *Lloyd* v. *Johnes*, 9 Ves., 37; *Denning* v. *Smith*, 3 Johns. (N. Y.) Ch., 344.

Lastly, it will be argued that, upon the ground of a general want of equity on the part of complainants,—the demurrer must be sustained, and the decision of the court affirmed. *Megham* v. *Mills*, 9 Johns. (N. Y.), 64; 4 Ves., 387; 16 Id., 467; 18 Id., 425; 1 Kelly (Ga.), 193; *Ex parte Ruffin*, 6 Ves., 119; *Ex parte Williams*, 11 Ves., 3; 2 Story Eq. Jur., 736; *Elmendorf* v. *Taylor*, 10 Wheat., 168; *Foster* v. *Hodgson*, 19 Ves., 185; *Gregory* v. *Gregory*, Coop., 201.

Mr. Sergeant, for the city of Augusta, made the following points:—

I. That the decree of the Circuit Court of the United States, made in the year 1830, is final and conclusive, and cannot be appealed from, reviewed, or set aside, nor questioned; and this appears upon complainants' bill. No court of equity, therefore, can maintain such a bill.

The principle thus stated is so familiar and settled, that no authority is necessary for it. One case, however, may be referred to, because the decision was between the same parties, on the very same points, upon full hearing, by a court entitled to the peculiar respect of these parties complainants, being the highest court of the state of South Carolina, of which state both of the complainants are citizens, of whose laws it is the highest evidence. *Yarborough and others* v. *The Bank of the State of Georgia and others*, Chancellor Harper's opinion, p. 113, affirmed in the Equity Court of Appeals, at Columbia, p. 120. The grounds of the affirmance sufficiently appear in the assignment of errors, pp. 118, 119.

II. It is argued in the bill, that Yarborough was not a party. *Referring only to the statement in the complainants' bill, which is open on the demurrer, the first remark to be made upon it is, that Yarborough and Shultz are joint complainants, making a joint statement, and uniting in one prayer for relief. If Yarborough really had any equity of his own, and Shultz only the contrary of equity, by whatever name called, it would not follow, it may be admitted, that he would not have a right to sue out an original bill, according to his equity. It may be admitted, further, that he might have a right to make Shultz a party defendant. But if they unite in one right, it must be obvious that the want of equity [*600

of the one must be available against both, and is demurrable. See *Makepeace* v. *Haythorne*, 4 Russ., 244: Redesd., 283, n., 2.

There is another remark to be made. In the original bill, Shultz and one Breithaupt were complainants, and they proceeded together as joint complainants, throughout all the stages of the case, including the final decree. Breithaupt acquiesces in the decree, and, no doubt, had the benefit of it. He separates from Shultz, and is not a complainant here. Thus, then, in this bill, which professes to be in the nature of a bill of revivor, and supplemental bill, one of the original complainants is laid aside or retires, and a new complainant is brought in and made a party. This is somewhat extraordinary.

But, further, in the bill there is a want of equity, in two essential particulars. The complainants nowhere deny that Yarborough knew of the pendency of the case in the Circuit Court of the United States for the state of Georgia. Shultz does not deny that Yarborough knew of it. In point of fact, it is very plain that he did know. In point of equity it was his duty to know, and in duty Shultz was bound to inform him. Nothing but a clear and positive denial could be admissible, and that would hardly be credible. Without such an averment, it becomes a fact in this case, that Yarborough did know. That Shultz did know, it is needless to say. If, with this knowledge, Yarborough stood by, and suffered Shultz to proceed with the suit, until a final decree was made, and years after, what pretence of equity can he have? They do aver, both of them, that the bridge property and rights became vested in Yarborough (which, by the by, is matter of law as to which the highest judicial authority in South Carolina has pronounced them to be wrong), and they also aver, that no act or consent of Yarborough or of Shultz, could impair the right. But they nowhere aver that there was no such act or consent, as a fact, nor that Shultz did not act under the
*601] authority and with the knowledge, consent, and approbation of Yarborough. *They attempt, also, to bring in question the authority of the solicitor who acted for the complainants; which is a question not inquirable into here. If it were, it is only necessary to say, that the decree went down to the Circuit Court, was entered there, and the money raised from the sale of the mortgage properly distributed under it, without objection then, or for fifteen years afterwards, when, for the first time, Mr. Yarborough comes in with Mr. Shultz. If Mr. Yarborough thus neglected his duty, the creditors (if there be any) have their remedy against him for his misconduct and neglect.

But is it true, that Mr. Yarborough, under the insolvent law of South Carolina, acquired such a right as is here insisted upon? What the date of the assignment to him was is not stated in the bill; but it appears in the exhibits to have been on the 18th of December, 1830. The complainants allege that it related back to the 13th of October, 1828. Whether it did so or not is for the present purpose immaterial. The operation of the assignment upon real estate and franchises within the State of Georgia, and then, at the instance of the insolvent himself, in the custody of a court in the district of Georgia, and under the actual exercise of jurisdiction by such court,—is it such in law that if the assignee be not made a party, the suit must abate or the jurisdiction be rendered inoperative? This is the question. To establish it would require that South Carolina had attempted such extra-territorial legislation, and the next, that Georgia submitted and agreed to it; but South Carolina did not, and does not so interpret her legislation, nor suffer her citizens so to interpret it. This has been distinctly decided by the highest court of South Carolina. Chancellor Harper's opinion, 116. This is conclusive authority. It is unnecessary to cite others.

The fact of the bridge being partly in each state, as to its effect upon the jurisdiction, may be considered as decided by the same case.

But supposing the last objection out of the way, would an insolvent assignment operate in such a suit? It is not meant to inquire whether the assignee, upon his own application, made in due time, might be permitted in equity to become a party, or at all events to give notice of his right in some way upon the record. At law, he may have a suit marked to his use. But bankruptcy does not abate a suit, at law or in equity. 1 Cook's Bankrupt Law, 558, 560. The suit goes on. If the complainant become a bankrupt, his assignee may come in by supplemental bill. It depends upon himself whether he will or not. In either case, the suit goes on. He cannot file *a bill of revivor. Neither was it the business of the [*602
defendant to require or compel him to come in. It was the business and duty, therefore, of Mr. Yarborough himself to come in. If he neglected it, to the prejudice of his *cestui que trusts*, they must sue him. But he was not a necessary party. Nor is it necessary that he should state the bankruptcy, (Redesd. 282, note *n*,) even in a case then pending. It is not an abatement. Cooper Eq. Pl., 76, 77, and note.

III. There is another want of equity in the bill, believed to be decisive in itself, against both the complainants. In such a bill, the complainants must state their whole equity, nega-

[illegible] they can have no [illegible]

[illegible] apply to [illegible] peculiar to the [illegible] of Augusta [illegible] considered, and each in itself [illegible]

First. It appears from the present bill that the Bank of Georgia [illegible] the mortgage in the state court of Georgia, [illegible] there was a decree of foreclosure and sale, and a sale was about to be made under it. In this state of things, the suit in the state court being [illegible] a decision upon the validity of the mortgage, Breithaupt and Shultz filed their bill on the equity side of the Circuit Court of the United States for the District of Georgia, praying an injunction in the mortgage case, and certain other cases, and the assumption of jurisdiction in the whole matter. On the 13th day of June, 1821, an injunction was ordered "to stay the sale of said bridge, until the further order of the Circuit Court of the United States should be had thereon." This injunction was granted to the complainants, who, taking the benefit, were bound by the terms. On the 21st of December, 1821, "with the consent of the parties, complainants and defendants," the Circuit Court appointed Freeman Walker and Christopher Fitzsimmons commissioners to make a sale of the bridge and appurtenances
*608] as mortgaged *to the bank, and required the parties to execute powers of attorney to the commissioners. The complainants executed powers of attorney. Colonel McKinne, who was a defendant, refused. This being reported, the court, on the 18th of May, 1822, "by consent of complainants," ordered a sale. On the 18th of November, 1822, a sale was made, returned, the money brought into court, and the sale confirmed by the court, without exception. At this sale, the Bank of Georgia became the purchaser. The Bank of Georgia, in 1838, sold to Gazaway B. Lamar, for a full and valuable consideration; and in 1840, Lamar, for a full and

valuable consideration, sold to the city of Augusta. By the final decree, which was a consent decree, the whole of the proceeds were distributed according to the agreement of parties filed on record.

Thus, then, it appears that the title of the city of Augusta is derived directly from the sale of the 28th of November, 1822, and gives them all the right which was acquired by the Bank of Georgia, under that sale. Now, this was long before Yarborough acquired any right, even if his assignment could be shown to relate back to the alleged assignment to Harrison, which the complainants state to have been on the 13th of October, 1828. Up to the sale, and six years after, the whole interest was in Shultz alone, and there was no such being in existence as Yarborough, assignee. The sale was, therefore, good.

It has been already shown that the Circuit Court had jurisdiction, the alleged defect in the bill being no defect at all. The sale, therefore, is a sale by the order of a court of competent jurisdiction, regularly conducted, confirmed by the court without objection, and the proceeds brought into court, and afterwards distributed by a decree of the court. Can it be necessary, or would it be respectful to the court, to argue that the purchaser at such a sale is protected by the law? There was no equity of redemption remaining; the whole was sold. There was nothing to come to Yarborough, or any body else, by assignment from Shultz.

But suppose there was a want of jurisdiction. It is not necessary to remind the court that that is only error, and even a reversal for error would not affect the title of a purchaser. Neither is it necessary to say what a singular equity it would be which was founded on his own defect in his own pleadings, especially after so great a lapse of time. The law is well settled. It is a general rule, "that the purchaser shall not lose the benefit of his purchase by any irregularity of the proceedings in a cause." Sugden (5th ed.), 46. All that the purchaser is bound to see is, that, as far as appears upon the face of the *proceedings, there is no fraud in obtaining [*604
the decree. It is not pretended here that there was any fraud. The complainants do not allege that there was. There is no pretence of that kind set up.

Secondly. If the want of jurisdiction in the Circuit Court, for the reason alleged, were made out, (as it is not,) still Shultz, and those claiming under him, would be estopped in equity from disputing the title derived from the sale. Yarborough, as has been seen, derives from Shultz, by an assign ment not claimed to be earlier that six years after the sale,

[illegible]

V. The complainants [illegible] in their bill an averment [illegible] notice. They do not say that the Bank of Georgia had any notice. So that they must admit the title of the Bank of Georgia to be in good condition. The title of the Bank they admit was conveyed to Mr. Lamar, and by him to the city of Augusta. The Bank of Georgia does not dispute it. [illegible] and how these complainants got any right to inquire into the consideration. If there were a defect in the title of the bank, the question of consideration and notice might arise,—but not here. If the title of the bank was good, so was the title of Mr. Lamar, and so is the title of the city of Augusta. The saying about notice (for it cannot be called an averment) is altogether defective and insufficient, for want of explicitness and intelligible particularity.

VI. There is still a further want of equity, or, more precisely speaking, a negative of equity, showing that, at the time of this suit instituted, the complainants had no right at all. The right they had was derived from legislative acts of the state of Georgia, both limited in time. The time expired, and the respective Legislatures, in the year 1840, granted the property and privileges to the city of Augusta. The construction of this in equity has been determined in South Carolina, in the case before referred to. Chancellor Harper's opinion, p. 114. This appears in the complainant's bill.

VII. As to the suggestion loosely thrown out in the bill, that the two ends of the bridge were in different states, it is not easy to perceive how any equity can grow out of it. All that it would amount to would be a question of jurisdiction. But that was waived and lost. It might have been pleaded to the jurisdiction of the state court of Georgia. No such plea was put in, and the court made a decree, which has never
*605] been appealed *from, nor set aside, nor reversed. In the Circuit Court it was not objected to. All that was asked was to enjoin the sale by the state court, and take the sale and distribution of the proceeds into the hands of the Circuit Court, and this was asked, consented to, and carried through by the present complainant, Shultz. And further, the sale and conveyance were made under his power of attorney, so that the present owners hold under his own deed.

There are two points which have been touched incidentally in the preceding statement, which might be insisted upon more at large; namely, the title of the city of Augusta, as a

bona fide purchaser, and the length of time. The bill states that the purchase was made on the 21st day of January, 1840. This was upwards of seventeen years after the sale. It was upwards of eleven years after the final decree, which placed it beyond the reach of an appeal; beyond the reach equally of a bill of review, which has the same limit at least as an appeal; and, in truth, unassailable in any way, in the same jurisdiction; while by its own nature it was protected from being questioned collaterally. What can be meant by the alleged notice, therefore, it is impossible to conceive. Several more years elapsed, as has been seen, before the complainants themselves awakened to the consciousness that there was anything to take notice of. They slumbered on until 1845, before they commenced this suit, giving no sign but of profound acquiescence in what had been done. What notice had the city of Augusta to the contrary? This is the grossest laches, or worse. Either destroys all pretence of equity.

There might be added some points upon the form of proceeding here adopted. If they should be deemed necessary, they will be presented in a separate paper.

Mr. Justice McLEAN delivered the opinion of the court.

Henry Shultz and Lewis Cooper, in the year 1813, obtained from the state of South Carolina a charter for a bridge over the Savannah River, opposite the town of Augusta, in Georgia, for the term of twenty-one years; and in 1814 the state of Georgia granted to them a charter for the term of twenty years. In 1816, Henry Shultz and John McKinne, being the joint owners of the bridge, formed a partnership in the business of banking, under the name of the "Bridge Company of Augusta;" the bridge was valued at seventy-five thousand dollars, and it, with other property named, constituted the partnership stock. In 1818, Shultz sold and transferred his interest in the partnership to Barna McKinne. The consideration of this *purchase was the sum of sixty- [*606
three thousand dollars, which Shultz owed to the firm, and which was credited to him on their books.

In a short time, the firm became greatly embarrassed. Among other debts, they owed to the Bank of the state of Georgia the sum of forty thousand dollars; and they obtained from it a further loan of fifty thousand dollars, with the view, as was stated, to relieve the Bridge Company. To secure the payment of the sum of ninety thousand dollars to the bank, the McKinnes mortgaged the bridge, eighty negroes, and some real estate, the 10th of June, 1819. Previous to this the "Bridge Bank" stopped payment. On being informed of

this suit. Finlay removed its place in the firm by procuring a transfer of Daria McKinne's interest. He advanced fifteen thousand dollars of his own funds to pay deposits in the bank, and took other steps with his partner to sustain the credit of the wrecked institution.

In 1831, a petition was filed in the Bank of Georgia, in the Superior Court for Richmond County, praying a foreclosure of the above mortgage; and at the May term of that court, a rule was entered to foreclose the mortgage, unless the principal and interest due on it should be paid; and at May term, 1832, the rule was made absolute. The sum of $69,493 was found to be due on the bank on the mortgage, and the property was directed to be sold. The sale was enjoined by Shultz, Christian Breitenstein, and others, by filing a bill against the bank in the Circuit Court of the United States for the District of Georgia, which, among other things, prayed that the property might be sold, and the proceeds applied to the payment of the creditors of the Bridge Company, and particularly to those who had obtained judgments. An order was made for the sale of the bridge, and commissioners were appointed to make the sale. The sale was made on the 28th of November, 1822, to the bank, for the sum of seventy thousand dollars. For this amount the bank issued scrip, which by the order of the court was deposited with its clerk.

In the further progress of the suit, the judges of the Circuit Court were opposed in opinion on the following points:— 1. Whether the complainants were entitled to relief. 2. What relief should be decreed to them. These points being certified to the Supreme Court, at the January term, 1828, the cause was dismissed for want of jurisdiction. The record did not show that a part of the defendants were citizens of the state of Georgia.

*607] At the January term of the Supreme Court in 1830, Messrs. *Wilde and McDuffie, being counsel for the parties, agreed in writing that the cause should be reinstated, and that the pleading should be amended by alleging, "that the stockholders of the bank were citizens of Georgia," and that the cause be argued. The court dismissed the case, on the ground that the whole cause was certified, and not questions arising in its progress. And the case was remanded to the Circuit Court, with "directions to proceed according to law."

This mandate was received by the Circuit Court at their May term, 1830, and the case was reinstated on the docket. And at the same term "the cause came on to be heard on the amended bill, answers, exhibits, and evidence, and the court

having considered the same, it was ordered and decreed, that the sale of the Augusta bridge, made by virtue of certain powers of attorney and the consent of the parties, and held and conducted under the direction of commissioners heretofore appointed under this court, be, and the same is hereby, ratified and confirmed, and the said Bank of the state of Georgia vested with a full, absolute, and perfect title to the said bridge and its appurtenances, under the said sale, freed, acquitted, released, and discharged from all manner of liens, claims, or encumbrances, at law or in equity, on the part of the said Henry Shultz, John McKinne, Barna McKinne," &c.

"And it is further ordered and decreed by the court, by and with the consent of the parties, complainants and defendants, that the scrip issued by the Bank of the State of Georgia for the sum of seventy-one thousand six hundred and eighty-six dollars and thirty-six cents," &c., "be cancelled and delivered up to the bank by the clerk," &c., "and that the bill of complaint as to the several other matters therein contained, be dismissed, with costs." Under which decree is the following agreement:—"We consent and agree that the foregoing decree be entered at the next or any succeeding term of the said Circuit Court of the United States, District of Georgia;" signed, "George McDuffie, Sol. for complainants, and R. H. Wilde, Sol. for defendants." Dated Washington, 10th April, 1830. And the court say,—"The within decree having been drawn up, agreed to, and subscribed by the solicitors, on behalf of the parties, complainants and defendants, on motion of Mr. Wilde, ordered that the same be filed and entered as the decree of this court," signed by both of the judges.

Fifteen years after the above decree was entered, the bill now before us was filed by Yarborough, as trustee of Henry Shultz, an insolvent debtor, and for the creditors of Henry Shultz, and Henry Shultz in his own right, which they say is "in the nature *of a bill of revivor and supplement," against the Bank of the state of Georgia, the City Council of Augusta, John McKinne, and Gazaway B. Lamar. In this bill the proceedings in the original suit are referred to, and many of them stated at length, and they are made a part of the present procedure. And the complainants pray that the said original bill, with all its amendments, the answers, decrees, decretal orders, and evidence, may be reinstated and revived for the causes set forth, to the extent of the several interests of the parties to this bill. [*608

By way of supplement, the complainant Shultz states, that under the insolvent debtors' act of South Carolina, he executed an assignment of all his estate, in trust for his creditors, to

Thomas Harrison, on the 13th of October, 1828. That his interest in the bridge was transferred by this assignment. Afterwards, the complainant, John W. Yarborough, was appointed trustee of Shultz for the benefit of his creditors. That the bridge and its appurtenances having been originally pledged, as copartnership property, by John McKinne and Shultz for the redemption of the bills issued by them, the lien, never having been released, still remains. And if the mortgage executed to the bank be valid, the bank and all claiming under it occupy the ground of mortgagees in possession, and are bound to account for the rents and profits of the bridge, the same never having been sold under the foreclosure of the mortgage. That the bridge and its income are first liable to the redemption of bridge bills. After these are paid, one half of the surplus in the hands of the complainant, Yarborough, as trustee, to satisfy the creditors of Shultz, &c.

On the 4th of May, 1838, the bank conveyed its interest in the bridge to G. B. Lamar, for the sum of seventy thousand dollars, by a quitclaim deed. That Lamar purchased with a full knowledge of the title, and held the same, receiving the profits, up to 21st January, 1840, when he conveyed his interest in the bridge to the City Council of Augusta, for the sum of one hundred thousand dollars. That the city corporation had full knowledge of the claims on the bridge. The Legislatures of Georgia and South Carolina extended their charter of the bridge to the bank, on the 23d of December, 1840, reserving all liens upon it. That Yarborough, as trustee, out of the sale of the property of Shultz, paid bridge bills and judgments on such bills to the amount of about seventy thousand dollars, and that the unsatisfied creditors have the equity of now requiring a like amount of the copartnership property of the bridge company to be applied in payment of their individual claims. And in addition to the above payment, Shultz avers that he has paid *out of his private means, for the redemption of bridge bills, a sum of about one hundred and fifty-three thousand two hundred and ninety-six dollars. That the total amount paid by him out of his private funds, on account of bridge bills, was four hundred thousand eight hundred and twenty-six dollars, which he insists in equity he is entitled to receive, next after the redemption of the outstanding bridge bills. There is outstanding in bridge bills about the sum of ninety-two thousand dollars.

*609]

And the complainants allege that the decree, as entered on the original bill, is void as to all the parties except as regards the claim of Breithaupt, as the solicitor for the complainants in said bill did not represent the creditors of Shultz, and that

no act of the solicitor could impair their rights. That all the right of Shultz passed out of him by virtue of his assignment for the benefit of his creditors. That the decree was a fraud upon them. That the sale of the bridge by the commissioners was void, as John McKinne, an equal partner of Shultz, never assented to it. That the Bank of Georgia, and all those who have held and are now holding under it, are in equity bound to account. But if the sale of the bridge shall be held valid, the complainants allege that the bank is bound to account for the amount of the purchase-money and interest, and for the net sum of tolls received. And the complainants pray, that the original bill, with all the proceedings thereon, may be revived, and stand as before the decree was entered in 1830; that the said decree may be opened, reviewed, and reversed; that the mortgage to the bank may be declared null and void; and that the sale may be set aside, &c.

The defendants demurred to the bill, on the ground "that the complainants have not, by their bill, made such a case as entitles them in a court of equity to any discovery from the defendants respectively, or any or either of them, or any relief against them or either of them, as to the matters contained in the bill," &c. And afterwards John McKinne filed his answer, admitting the general allegations in the bill.

This bill has been considered by some of the defendants' counsel as a bill of review. But it has neither the form nor the substance of such a bill. Since the ordinances of Lord Bacon, a bill of review can only be brought for "error in law appearing in the body of the decree or record," without further examination of matters of fact; or for some new matter of fact discovered, which was not known and could not possibly have been used at the time of the decree.[1] But if this were a bill of review, it would be barred by the analogy it bears to a writ of error, which must be prosecuted within five years from *the rendition of the judgment. *Whiting et al.* v. *Bank of the United States*, 13 Pet., 15. [*610

Nor is this properly denominated a bill of revivor. When, in the progress of a suit in equity, the proceedings are suspended from the want of proper parties, it is necessary to file a bill of revivor. A supplemental bill is filed on leave, and for matter happening after the filing of the bill, and is designed to supply some defect in the structure of the original bill. But this does not appear to be strictly of that character. The complainants denominate it a bill "in the nature of a bill

[1] QUOTED. *Irwin* v. *Meyrose*, 7 Fed. Rep., 535; s. c., 2 McCrary, 247.

of revivor and supplement." It must be treated as an original bill, having for its objects the prayers specifically set forth.

The proceedings on the original bill, under which the property now claimed was sold, are not before this court, in their appellate character. We cannot correct the errors which may have intervened in that procedure, nor set it aside by a reversal of the decree. That case is collateral to the issue now before us.

The complainants insist, that the proceedings in the original suit, embracing the interlocutory decree under which the property was sold, and the consent decree of the 6th of May, 1830, were void for want of jurisdiction in the Circuit Court. It is not necessary now to inquire, whether the Circuit Court had power to enjoin proceedings under the judgment in the state court. The injunction was issued at the instance of Shultz, and for his benefit, and no question of jurisdiction was raised. But as there was no allegation in the original bill of citizenship of the stockholders of the Bank of Georgia, it is supposed the proceedings were *coram non judice*.

When the points on which the opinions of the judges of the Circuit Court were opposed were brought before the Supreme Court, at their January term, 1828, the cause was dismissed for want of jurisdiction. But afterwards, at the January term, 1830, of the Supreme Court, by the agreement of counsel, the record was amended by inserting the allegation, "that the stockholders of the bank were citizens of Georgia," and the cause was reinstated on the docket, and dismissed because the whole case was certified, and not the points on which the judges differed, as required by the act of Congress. The cause was sent down to the Circuit Court by a mandate, which directed that court to proceed therein according to law.

This court, it is contended, have no power to amend a record brought before them, and consequently the above entry was void.

There is nothing in the nature of an appellate jurisdiction, *611] proceeding according to the common law, which forbids the *granting of amendments. And the thirty-second section of the Judiciary Act of 1789, allowing amendments, is sufficiently comprehensive to embrace causes of appellate, as well as original jurisdiction. 1 Gall., 22. But it has been the practice of this court, where amendments are necessary, to remand the cause to the Circuit Court for that purpose.[1] The only exception to this rule has been, where the counsel on both sides have agreed to the amendment. This has been

[1] QUOTED. *Udall* v. *Steamship Ohio*, 17 How., 18.

often done, and it has not been supposed that there was any want of power in the court to permit it. The objection is, that consent cannot give jurisdiction. This is admitted; but the objection has no application to the case. Over the subject-matter of the suit and of the parties, the court had jurisdiction, and the amendment corrected an inadvertence, by stating the fact of citizenship truly.

When a cause is brought before this court on a division of opinion by the judges of the Circuit Court, the points certified only are before us. The cause should remain on the docket of the Circuit Court, and at their discretion may be prosecuted.[2]

But if no amendment had been made, would the orders and decrees in the case by the Circuit Court have been nullities? That they have been erroneous, and liable to be reversed, is admitted. In *Skillern's Ex'rs.* v. *May's Ex'rs.*, 6 Cranch, 267, a final decree had been pronounced, and by writ of error removed to the Supreme Court, who reversed the decree, and after the cause was sent back to the Circuit Court, it was discovered to be a cause not within the jurisdiction of the court; but a question arose whether in that court it could be dismissed for want of jurisdiction, after the Supreme Court had acted thereon. The opinion of the judges being opposed on that question, it was certified to the Supreme Court for their decision. And this court held, "that the Circuit Court was bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

The judgments of inferior courts, technically so called, are disregarded, unless their jurisdiction is shown. But this is not the character of the Circuit Courts of the United States. In *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 185, this court say,— "The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded."

And again in the case of *McCormick* v. *Sullivant*, 10 Wheat., 199, in answer to the argument that the proceedings were void, *where the jurisdiction of the court was not shown, the court say, the argument "proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdic- [*612

[2] FOLLOWED. *Ward et al.* v. *Chamberlain et al.*, 2 Black., 434. CITED. *Daniels* v. *Railroad Co.*, 3 Wall., 255.

[illegible] that they are not in that case [illegible] in the [illegible] which [illegible] the judgments taken alone, are to be considered. If the jurisdiction be not alleged in the proceedings, such judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not void [illegible]."

From these authorities it is clear that the proceedings in the original case are not void for want of an allegation of citizenship of the stockholders of the bank. They were erroneous, and had no amendment been made might have been reversed within five years from the final decree, by an appeal or a writ of error. But the mandate of this court which contained the amendment as to the citizenship of the stockholders of the bank agreed to by the counsel was filed in the 6th of May, 1850, in the Circuit Court, and it necessarily became a part of the record of that court. This was before the final decree was entered, and it removed the objection to the jurisdiction of the court. After this the decree could not have been reversed for the want of jurisdiction. In the case of *Bradstreet* v. *Thomas*, 12 Pet. 64, the court held that an averment of citizenship in a joinder in demurrer, not being objected to at the time, was sufficient to give jurisdiction.

The sale of the bridge is alleged to be void, as it was made without the consent of John McKinne, who was an equal partner with Shultz.

The court ordered the bridge to be sold by Walker and Fitzsimmons, commissioners, and that the parties should execute powers of attorney to the commissioners authorizing the sale. All the parties concerned executed the powers except McKinne, and his refusal or neglect to do so prevented the sale. But afterwards the court, with the assent of the complainants, ordered the bridge to be sold for a sum not less than fifty thousand dollars, by the same commissioners, who were authorized to take possession of the bridge and receive the tolls until the sale was made.

McKinne does not complain of this sale, and Shultz consented to it. It was manifest from the embarrassment of the Bridge Company that the bridge must be sold, and the nature of the property seemed to require a speedy sale. All objection to that sale by the parties on the record, must be considered as having been waived by the consent decree in
*618] May, 1850. *That decree "ratified and confirmed" the previous sale of the bridge. That the counsel who consented to that decree represented the parties named on the record is not controverted. A decree thus assented to and

sanctioned by the court must stand, free from all technical objections.

But it is urged, that the consent of Shultz to the final decree did not bind his creditors, to whom he had assigned the bridge and his other property under the insolvent act of South Carolina.

That assignment was made on the 13th of October, 1828. The bridge was sold by the commissioners, under the interlocutory decree of the court, in 1822; and the proceeds were held by the bank, subject to the order of the court. There was no abatement of the suit by the assignment of Shultz. The insolvent laws of South Carolina had no extra-territorial operation. They can only act upon the persons and the property within the state. The assignment did not affect property in Georgia, which was in the custody of the law,—property which had been sold, with the express consent of Shultz, under the authority of a court of chancery; and the proceeds of which were kept subject to the distribution of the court.

The trustee of Shultz took no step to connect himself with the proceedings in the Circuit Court, although two years elapsed after the assignment, before the final decree was entered. For about seventeen years, he seems to have been passive in this matter, and until the present bill was filed. After so great a lapse of time, without excuse, he cannot be heard to object to a decree which was entered by consent. The power of attorney given by Shultz to the commissioners, which authorized them to sell the bridge, for the purposes specified, was conclusive upon him, and all claiming under him. And the decree which was agreed to by his counsel followed as a necessary consequence of the sale.

It does not appear that the holders of bridge bills had a specific lien upon the bridge. They were creditors of the Bridge Company, and could claim the rights of creditors against a fraudulent conveyance of the bridge and of its proceeds. But such a claim must be duly asserted and diligently prosecuted. A failure in this respect for fifteen years might well be construed into an acquiescence fatal to the claim. We cannot now, under the circumstances stated, look into the decree to ascertain whether, in the distribution of the proceeds of the sale of the bridge and of the other property, the court may not have mistaken the rights of some of the creditors of Shultz.

The objection, that the mortgage to the bank under a statute *of Georgia was void, is not open for examination. If anything was settled by the decree, it was the validity of that instrument. And this remark applies to [*614

several of the other objections made by the complainants. McKinne was a party to the record, and through his counsel assented to the final decree; but the counsel of Shultz now object to its validity, because McKinne did not assent to the sale of the bridge. And this objection is for the first time made in the bill before us. And it is not made by McKinne.

Within five years after the decree was entered, he might have reversed it, if erroneous, by an appeal or a bill of review. And that time having long since elapsed, the decree must stand as concluding the rights of parties and privies, unless it shall be held to be void. It cannot be so held, as we have shown, on the reasons assigned in the bill. Fraud in the obtainment of the final decree is not alleged in the bill. If this were stated and proved, it would authorise the court to set aside the decree. But even this would not affect the sale of the property, unless the purchasers should be, in some degree, connected with the fraud.

The final decree in the case, which covered and adjusted the whole subject of controversy before the court, was not only assented to by the counsel, but it was drawn up and agreed to by them. The court adopted it as their own decree, and entered it upon their record. It confirmed the sale of the bridge, and made a distribution of the proceeds. The bill was dismissed as to certain matters where relief was not given. The proceedings were not void for want of jurisdiction in the court. Nothing was left for its future action. The whole controversy was terminated. And here the matter rested for fifteen years, until the bill before us was filed. It asks the court to set aside the decree, and re-investigate the whole matter of the former suit. No fraud is alleged against the decree. The want of jurisdiction in the court, as urged, is not sustained. Errors in the procedure cannot now be examined. The decree of the Circuit Court is, therefore, affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Georgia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

APPENDIX.

PLINY CUTLER, APPELLANT, *v.* WILLIAM A. RAE.

(7 Howard, 729–738.)

MY attention was called early in this term of the court, by a letter from F. C. Loring, Esquire, Counsellor at Law in Boston, to the declaration in the first sentence of my opinion in the above case, "that this court has decided an important constitutional question of admiralty jurisdiction, without either oral or printed argument."

Mr. Loring's letter was the first intimation I had, that an argument upon the jurisdiction had been filed by him, upon the part of the libellant and appellee in the cause.

Subsequently, my attention was called to Mr. Loring's argument by my brother Nelson, and afterwards it was made the subject of remark in one of the court's conferences, by the Chief Justice.

It is due to myself, to Mr. Loring as counsel in the cause, to the court, and particularly to the Chief Justice, who delivered the court's opinion, that I should say that an argument upon the constitutional jurisdiction was filed by Mr. Loring. The history of the cause in the Supreme Court was as I shall here state.

The case was filed and docketed, January 6th, 1847. On the 16th of February, Mr. Loring and Mr. Fletcher filed their arguments upon the merits, and an order was made to submit the cause upon them. So the case stood until the last term of the court. In 1848, January 24th, the case was again submitted upon printed arguments by the same counsel. In neither was the constitutional question of jurisdiction touched. On the 17th of February, the court passed the following order, I believe upon the suggestion of the Chief Justice:—"In the printed arguments filed in this case, the question of jurisdiction raised by the fourth point stated in the record has not been noticed. The *court desire that point to be [*616
argued by counsel, either by printed argument or orally at the bar, as counsel may prefer." Under this order, Mr. Loring filed his argument upon the jurisdiction. Afterwards, on the 22d of December, 1848, the following letter from B. R. Curtis,

Esquire, to David H. Hall, Esquire, of Washington City, was read to the court by the latter, and was filed with the other papers in the cause.

"BOSTON, *December 20th*, 1848.

"Dear Sir,—In the case of Rae and Cutler in the Supreme Court, respecting which Mr. Fletcher has heretofore corresponded with you, I have to request that you would make known to the court, that the appellant has instructed his counsel not to insist upon the objection to the jurisdiction which appears on the record; and that for this cause the counsel present no argument in support of the exception. The parties in interest are the underwriters, and they feel desirous that the courts of the United States sitting in admiralty should retain jurisdiction in cases of general average.

"If the court should proceed to the merits, will you allow me to ask you to refer them to a case not cited in the argument, of which notice has been given to Mr. Loring, the counsel for the appellee,—*March* v. *Roberson*, 4 Wheat., 360. You will of course make the proper charge for these services, and I will see you are paid.

"Your obedient servant,

"B. R. CURTIS.

"DAVID H. HALL, Esquire, Washington."

On the 26th of the month, the cause was submitted on further argument by Mr. Loring, without argument upon the jurisdiction from the opposing counsel, and on the 2d of March, the judgment below was reversed for want of jurisdiction. See 7 How., 729. Without any fault upon the part of our Clerk, William Thomas Carroll, Esquire, whose care it is to distribute briefs and arguments to the judges, I did not receive Mr. Loring's argument upon the jurisdiction. I aided in the court's consultations upon the case, without knowing that such an argument had been filed, I gave an oral dissent from the judgment of this court dismissing the cause for want of jurisdiction, under that impression. The dissent was afterwards extended, as it appears in the report of the case, in the full belief that the counsel in the cause had disregarded the order of the court, and that the court in deciding the case had
*617] yielded the point required by its order. I was misled by the letter from *Mr. Curtis. I am pleased that it was otherwise. My duty growing out of it is the statement I have made. I also think it due to Mr. Loring, and to the court, to request the Hon. Benjamin C. Howard, the Reporter of the court, to print with this communication the argument made by Mr. Loring upon the jurisdiction of the court.

In respect to causes involving constitutional questions being submitted to the court upon printed arguments, my impression has been that such cases were not within the rule. It has not with the judges been mine alone. It has, however, been done twice. The cases have been brought to my notice by the Chief Justice. Once in the case of *Bronson* v. *Kinzie, et al.*, 1 How., 311, upon a written submission with the consent of the court, and again at this term without opposition by any member of it, in the case of *Nathan* v. *The State of Louisiana.*

I shall hereafter consider it to be the understanding of the majority of the court, that the rule permitting cases to be submitted on printed arguments comprehends the submission of such as involve constitutional questions.

JAMES M. WAYNE.

Associate Justice Supreme Court U. States.

December Term, 1849.

Argument for the Libellant upon the Question of Jurisdiction.

The case presented is a claim by the owners of a ship against an owner of the cargo, to recover contribution for an injury *voluntarily done* to the ship on the high seas, for the common benefit, by which the property, from the owner of which contribution is sought, was preserved from destruction by an impending peril.

Whether the facts in evidence make such a case as entitles the owner of the ship to a contribution has been previously discussed, in order to present the question of jurisdiction that must be assumed.

The question now to be considered is, whether such a claim is within the jurisdiction of the District Courts of the United States sitting in admiralty, or, in other words, is a proper matter for admiralty and maritime jurisdiction. The late decisions of this tribunal upon the subject of jurisdiction limit the range of discussion, forasmuch as it must now be considered as settled that the admiralty jurisdiction of the courts of the United States, both as to contracts and torts, is more extensive than *that exercised by the High Court of Admiralty of England at the time of the formation of the Constitution, and that, in cases of contracts, it embraces those "concerning the navigation and trade of the country upon the high seas and tide-waters, with foreign countries, and among the several states." *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How., 392; *Waring* v. *Clark*, 5 Id., 431; *Peyroux* v. *Howard*, 7 Pet., 324. [*618

The present inquiry is, therefore, limited to the question,

whether general average, or the right to claim contribution for sacrifices, losses, and expenses voluntarily incurred or suffered in the course of a voyage, for the common benefit, is, or depends upon, a contract concerning the navigation and trade of the country.

This definition seems to assume the question. But it is impossible to define general average as a matter or incident pertaining to any thing but a marine voyage. The principle on which it is founded is, at least by the common law, exclusively limited to maritime cases, and no case can be found in which it has ever been applied to facts happening on land unconnected with a ship, its cargo, or freight.

Parallel cases may occur on land; as, for instance, where a building has been blown up or pulled down to prevent the spread of a conflagration; but there is no case to be found in which it has been held that the owner of the building had a claim for contribution for his loss upon the owners of the adjacent buildings whose property was preserved by the sacrifice of his, and there is no authority to be found on which such a claim could be rested.

The case of *Welles* v. *Boston Ins. Co.*, 6 Pick. (Mass.), 182, does not make an exception, because there the action was upon a policy of insurance, brought to recover the value of an article purchased, by the advice of the defendants, for the purpose of preserving the property; and because the defendants were willing to pay a proportion, and actually paid it into court. The question of contribution was not, therefore, raised, discussed, or decided; and, in fact, the court intimated a doubt whether the defendants were liable at all in law, saying, "for a proportion of the sacrifice the defendants are equitably, if not legally, entitled to recover," a sum exceeding which proportion the defendants had paid into court as above stated.

The books in which the subject is discussed have been searched in vain to find a definition of general average or contribution, in which it is not exclusively confined to maritime
*619] cases. In those which treat of shipping and insurance, where *this subject is necessarily discussed, this, it may be said, must be expected, and therefore they furnish no weight of authority; but the same definition is to be found in the books which profess to treat of the law at large, and in decisions of common law courts.

3 Kent Com., 232:—"The doctrine of general average grows out of the incidents of a *mercantile voyage*, and the duties which it creates apply equally to the owner of the ship and of the cargo. General, gross, or extraordinary average means a contribution, made by all the parties concerned,

towards a loss sustained by some of the parties in interest, for the benefit of all; and it is called general or gross average, because it falls upon the gross amount of ship, cargo, and freight."

Simonds v. *White*, 2 Barn. & C., 808:—"The obligation to contribute depends not so much upon the terms of any particular instrument as upon a general rule of *maritime law*."

Scai v. *Tobin*, 3 Barn. & Ad., 523:—"The question of liability here (general average) depends *entirely* on the *maritime law*."

Citations to the same effect might be multiplied *ad infinitum*.

The doctrine of general average, growing out of the incidents of a mercantile voyage, and relating exclusively to ship, cargo, and freight, and depending upon the maritime law, necessarily from its very definition pertains to the trade and navigation of the country upon the high seas and tide-waters, and therefore falls within the admiralty jurisdiction, as established by this court in its most recent, as well as in many previous decisions.

General average is sometimes considered as arising out of the contract of affreightment; that is, that there is a contract implied by law between the owners of the ship and the owners of the cargo, by which it is agreed, that, in case it should be necessary for the common benefit that any sacrifice be made of the vessel or cargo, the owners of what is preserved thereby shall contribute to make good that loss. Pothier, Maritime Contracts, Part 1, sect. 3, art. 96:—"Finally, the freighter contracts the obligation of contributing to the common average." And Part 2, sect. 1:—"The merchant who lades goods by the contract of charter party, (or affreightment,) promises the master by the contract to contribute to the common average which may take place during the voyage; and, *vice versâ*, the master virtually promises the merchant shipper, in case his property suffer any average losses for the good of all, to *cause him to receive an indemnity by [*620
contribution of the owners of the ship and other merchants. The subject of this contribution is, therefore, dependent on the contract of charter-party, and ought to be considered next to this contract. Average in marine language signifies the loss and damage suffered in the course of navigation. Common average is that suffered for the common safety, and alone admits of contribution."

If the doctrine of general average is to be considered as growing out of the contract of affreightment, it is a part of the contract, and therefore, by the decision in 6 Howard, falls within the jurisdiction of the District Court. It being ex-

pressly decided in that case, that the contract of affreightment is within the jurisdiction.

And while referring to that case, in which it was conceded by counsel, that the Admiralty Court of England would not exercise jurisdiction over a contract of charter-party or affreightment, and upon which assumed fact the division of opinion in the court seemed to arise, it may be remarked that the concession was unnecessary, and not correct in point of fact. There is a case in the first volume of Haggard's Reports, p. 226, *The Elizabeth*, in which the jurisdiction was exercised and sustained by Lord Stowell, in a suit on a charter-party for the charter money. The suit was originally brought in a Vice-Admiralty Court. A protest was made to the jurisdiction, which was overruled, and an appeal taken to the High Court of Admiralty. The appeal not being prosecuted, the defendants moved to have it pronounced deserted and for costs, which was granted.

The question of jurisdiction, it is true, was not argued in the higher court, but the judgment of the lower court was not reversed, as it must have been if the court had no jurisdiction over the subject-matter. See also the case of *The Fly*, 2 Browne's Civil and Adm. Law, 539, which was a suit brought in the admiralty on a charter-party for damages, which was entertained, and relief granted.

These cases fully sustain the proposition of Dr. Browne, that the court of admiralty could not refuse to entertain jurisdiction over a charter-party unless prohibited, and demolish the argument against the jurisdiction of the District Court over contracts of affreightment, which depends entirely on the assumed fact that they were not subjects of admiralty jurisdiction in England.

If, however, the claim for general average is to be considered as a quasi contract, created by implication of law at the time when the voluntary loss or sacrifice is incurred, then, whenever that happens upon the high seas, the locality is maritime, the *service is maritime, and all the elements exist necessary to bring the case within admiralty jurisdiction.

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Indeed, it would be difficult to conceive of a service more purely and exclusively maritime than a jettison for the common safety upon the high seas, and the rights and duties growing out of it necessarily follow the principle.

Salvage is a subject of admiralty jurisdiction in England as well as in this country, and the jurisdiction has never been questioned; but it is extremely difficult to see any respect in which salvage differs from general average, so that one should be without and the other within the jurisdiction.

The service in both cases is maritime, and the object in both is to save property. If to tow a deserted vessel into port, or to take cargo out of her, or to render assistance to a vessel on shore in distress, are maritime services, it is difficult to see why the claim for contribution of an owner whose cargo is jettisoned for the common safety, or of a vessel the masts of which are cut away, or which is voluntarily run on shore for the purpose of saving life, vessel, and cargo, does not equally depend upon a maritime service, and should not be a subject of the same jurisdiction.

Indeed, there is no distinction made between them in the books; they are usually considered together, in the same chapter, as "Salvage and General Average," and are often spoken of together as the "quasi contracts of salvage and general average."

The jurisdiction of the admiralty over this subject may be put upon the ground of the lien which exists on the part of the owner of the thing sacrificed upon the things preserved.

The existence of this lien *in rem* is universally admitted.

1 Emerigon des Ass., p. 651, ch. 12, sect. 43:—"L'Action en contribution est *reele* de sa nature."

Casaregis, Disc. 45, *n.* 34:—"Actio ad petendam contributionem est *in rem* scripta."

Ordonnances de la Marine, liv. 3, tit. 8, sect. 21:—"Si aucuns des contribuables refusent de payer leurs parts, le maitre pourra, pour sureté de la contribution *retenir*, même faire vendre par autorité de justice, des marchandises, jusqu'à concurrence de leur portion."

Laws of Oleron, art. 9:—"When the vessel arrives, the merchants should pay their proportions (of the contribution), or the master may sell or pawn the goods, and use the money so raised to pay the same before the cargo is unladen."

Its existence is also recognized in the courts of common law here, and in England. *Simonds* v. *White*, 8 Barn. & C., *805; *Strong* v. *New York Fire Ins. Co.*, 11 Johns. (N. Y.), 323; *United States* v. *Wilder*, 3 Sumn., 308; *Seai* v. *Tobin*, 3 Barn. & Ad., 523; *Chamberlain* v. *Reed*, 13 Me., 387; *American Ins. Co.* v. *Coster*, 3 Paige (N. Y.), 323; *Cole* v. *Bartlett*, 4 Miller, 139. [*622

The existence of a maritime lien *in rem* has been held to be a sufficient ground for asserting admiralty jurisdiction, because no other court can enforce it.

Menetone v. *Gibbens*, 3 T. R., 269. Per Lord Kenyon:—"It would be highly inconvenient (if the admiralty had not jurisdiction), because that court proceeds *in rem*, whereas the courts of common law can only proceed against the parties."

Per Ashurst:—"One strong reason for supporting the admiralty jurisdiction is, that in these cases that court proceeds *in rem;* whereas we can give no such relief."

The reasons on which this doctrine is founded are stated in the case of *The Spartan*, 1 Ware, 154:—"There is another ingredient in this case which I hold to be conclusive in favor of the jurisdiction. If there is here an implied hypothecation raised by the law, it can be enforced by no other than an admiralty court.

"It is a right adhering to the thing, a *jus in re* which is to be made available against the thing *in specie*. The course of the common law allows of no process upon the hypothecation by which the subject itself is directly reached, and a satisfaction for this right extracted from it. If a court of admiralty cannot entertain jurisdiction of the case, then the law has given the right, it has provided the security, but has refused the only means by which it can be rendered with certainty available. It holds out the right, and holds back the remedy. Where the law raises a lien for maritime service, I hold that this court has the power to carry it into effect."

Also by Judge Story, in *United States* v. *Wilder*, 3 Sumn., 311:—"It is a case of general average, where, as in case of salvage, the right of the party arises from sacrifices made for the common benefit, or labor and services performed for the common safety. Under such circumstances, the general maritime law enforces a contribution independent of any notion of a contract, upon the ground of justice and equity, according to the maxim, *qui sentit commodum, sentire debet et onus.* And it gives a lien *in rem* for the contribution, not as the only remedy, but as in many cases the best remedy, and in some cases the only remedy; as, for example, where the owner of the goods is unknown. Indeed, it may be asserted with entire confidence, that in a great variety of cases, without such *628] a lien, the *shipowner would be without any adequate redress, and would encounter most perilous responsibility."

Another ground on which the jurisdiction may be sustained is, that the subject-matter is within the jurisdiction of the High Court of Admiralty in England.

That court, it is well known, formerly exercised jurisdiction over all contracts and torts of a maritime nature; and its present limited jurisdiction is the consequence of the encroachments of the common law courts.

Some subjects, however, have been left for its jurisdiction: the courts of common law having contented themselves with a concurrent jurisdiction, and among these may be classed the one now under consideration.

That this was originally within the jurisdiction of the maritime courts in England, and on the Continent, cannot be questioned.

It is treated of in the Consulat del Mare, and in all the codes of maritime laws established for the government and direction of the maritime tribunals, some of which contain express directions to the master to appear before the court of admiralty in such cases (Ord. de la Mar., liv. 3, tit. 8, art. 5); and is in its nature so purely of the sea, and so exclusive of the land, that it is not properly within the jurisdiction of any other tribunal; and it is not until within very recent times that courts of equity and common law have entertained jurisdiction over it, the first case at common law being in 1801.

It is highly improbable that there have not been previous disputes and lawsuits growing out of claims for contribution; these suits have not been at law or in equity, because the decisions of these courts are reported, and there are none relating to this subject; if there have been any such suits, and it seems impossible that there should not have been, they must, therefore, have been brought in the admiralty court, the decisions of which, previous to 1798, are not in print.

There is no case to be found in which a prohibition has been granted, or even asked, to prevent the court of admiralty from entertaining a case of this kind.

The negative testimony in favor of the jurisdiction in England is, therefore, very strong; as it appears that the subject is properly a matter of admiralty jurisdiction, and there is no case, and no authority, in or by which it has been questioned.

But there is other proof to sustain the jurisdiction other than that derived from the absence of all denial or question respecting it.

In a book published in London, in 1705, entitled, "A Treatise *on the Dominion and Laws of the Seas," it [*624 is asserted, without qualification, that the jurisdiction of the admiralty court extends to "all cases of gross adventure, all causes of *jactus*, and contributions with average."

2 Browne's Civil and Adm. Law, 122:—"If a party institute a suit in that court on a charter-party for freight, in a cause of average and contribution, or to decide the property of a ship, and be not prohibited, I do not see how the court could refuse to entertain it."

There is no case in which a prohibition has been granted where contribution was claimed.

Weskett on Ins., 185. Master may detain goods (in case of average), and juridically sell.

The Copenhagen, 1 Rob. Adm., 289. In this case the question whether there ought to be a contribution was considered by Sir W. Scott, without an intimation of a doubt in respect to the jurisdiction, nor was it incidental to the question of prize; it was a separate suit after the vessel had been restored. The court say expressly, "This is not merely or originally a matter of prize; she came in first from distress," &c. "In this case the trans-shipping, or rather the unloading, of the goods seems to have been for the common benefit of both, and therefore the expense of it seems to have the character of a general average."

It is therefore, so far as the jurisdiction is concerned, a case in point. The subject of general average was entertained, and no prohibition granted, if any was applied for.

The Eleonora Catharina, 4 Rob., 156. The question was entertained incidentally, whether a jettison was made for the common benefit.

The Gratitudine, 3 Rob., 240. In this case the power of the master to bind the ship, cargo, and freight by an express hypothecation, and the remedy in admiralty, are fully sustained. The same principles and reasons apply to the implied hypothecation created by law in cases of general average, and it is so considered and held by the court and the case referred to in illustration.

By the Articles of 16th February, 1633, it was declared, "that if suit shall be in the Court of Admiralty for building, amending, saving, or necessary victualling the ship, against the ship, and not against any party by name, no prohibition shall be granted, though this be done within the realm."

It would be no great straining of the word *saving* to apply it to those cases where the ship was preserved by a sacrifice of the cargo or a part of it, and thereby to bring cases of general average within the express terms of the Articles.

*625] *See decisions in relation to these Articles. *The Hope*, 3 Rob., 216, and *The Trelaconey*, 3 Rob., 216, *n.*

3 Salkeld, 23, "adjudged, that where a master pawns the ship at sea, the admiralty hath a jurisdiction; and that he may pawn to relieve the ship in extremity, for he being constituted master of the ship hath impliedly a power to preserve it in cases of danger." This would seem, from the language used, to apply to cases of extreme danger at sea, and if so, must be limited to the hypothecation created by law in cases of general average. But if it refers to the general power of the master to pawn the ship in foreign parts, it clearly recognizes the principle on which this suit is founded; and the same reasons exist for extending the admiralty jurisdic-

tion over the hypothecations arising by the maritime law from the acts of the master, and those arising from his express contracts.

The jurisdiction founded on an implied hypothecation is familiarly exercised in cases where repairs, &c., are made on foreign vessels, or those of another state. The maritime law gives the lien, and courts of admiralty, in England, as well as in this country, enforce it, on the ground of an implied hypothecation; the service is not the less maritime certainly if rendered while on the sea, and to preserve the ship or cargo, and the existence of the lien in cases of general average has never been questioned.

A case is cited in 1 Molloy, 149, in which a master borrowed money to ransom the ship, and sued the owner for it in the admiralty, in relation to which a prohibition was applied for and refused. It seems difficult to distinguish that case from the present in point of principle. See also cases of prohibition refused in *Anonymous*, Cro. Eliz., 685; *Radley* v. *Egglesfield*, 2 Saund., 260.

The American authorities in favor of the jurisdiction are numerous and direct. The question has not been previously before this tribunal, but the principles upon which it depends are maintained in the cases of *The Gen. Smith*, 4 Wheat., 438; *The St. Jago de Cuba*, 9 Wheat., 409; *Peyroux* v. *Howard*, 7 Pet., 329; *Andrews* v. *Wall*, 3 How., 568; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How., 344.

In the Circuit Courts there has been no express decision on the subject, but no case has been found where the jurisdiction has been questioned.

In *De Lovio* v. *Boit*, 2 Gall., 475, it was held that the jurisdiction extended to all maritime contracts, and as to what were such, "all civilians and jurists agree that in this appellation are included, among other things, charter-parties, [*626 affreightments, *marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts and quasi contracts respecting averages, contributions, and jettisons, and policies of insurance."

Cases for the adjustment or recovery of contributions are of familiar occurrence in the District Court of Massachusetts, and probably elsewhere. *Shelton* v. *Brig Mary*, 5 Boston Law Rep., 75; S. C., 6 Id., 73; *Sparks* v. *Kittredge*, 9 Id., 319, in the Massachusetts District; *The Mutual Safety Ins. Co.* v. *Cargo of Ship George*, 8 Law Rep., 361, in the Southern District of New York; S. C., N. Y. Leg. Obs. for June, 1848, p. 260. Other cases have been considered in the Massachu-

sess District Court of the knowledge of counsel which are not in print.

American Ins. Co. v. Canter, 2 Paige, N. Y. R. 233. Process in the instance side of the admiralty court is mentioned as the ordinary mode of enforcing a maritime lien.

Dunlap's Adm. Pr. p. 57:—"Cases of general average are legitimate subjects of admiralty jurisdiction, being cases of implied contracts arising out of the marine contract of shipment. The master has a lien upon the goods saved to enforce the payment of the lawful contribution. This is the maritime law of Europe and of the United States. The admiralty courts are the proper tribunals to enforce this lien, and adjust speedily the contribution."

If there are any cases or any books in which the jurisdiction of the court of admiralty over cases of general average has been denied, they have escaped my research.

As it must be admitted that the subject is in its nature maritime, and a proper subject for the cognizance of a court of general admiralty and maritime jurisdiction, the only mode by which it could be excepted from the admiralty jurisdiction of the District Court would be to show that the English Admiralty Court would not entertain jurisdiction of it.

That this, if proved, would not be a sufficient argument has been repeatedly held by this court; but at least we might ask from those who deny the jurisdiction over general average, one solitary decision, or at least a dictum of some judge, or elementary writer, or compiler, in support of such denial; but where is it to be found?

Another ground on which the jurisdiction might be placed is that of necessity, expediency, and convenience.

The law gives (it is universally admitted) to the party entitled to contribution a lien, or *jus in rem*, against the property saved or benefited by the sacrifice.

*627] *It is equally certain that this lien cannot be enforced by a court of common law. If it be the owner of the ship who is entitled to a contribution, he may, having possession, retain the goods till his claim is settled, and in this way compel a payment; but if he be the owner of the cargo who is entitled, though he has an admitted lien upon the ship, cargo, and freight, he cannot enforce it in any way; he has no remedy at common law but a personal suit against the other owners; his lien is perfectly valueless, because the common law provides no way of enforcing it.

In fact there is no decision to the point that an action for contribution could be maintained at common law until the year 1801 *Birkley* v. *Presgrave*, 1 East, 220.

And if the question were not to be considered as settled by mere precedents, it might well be doubted whether a court of common law had jurisdiction over the subject of general average any more than it has over salvage. See Abbott on Shipping, p. 557, *n.*; *Brevoor* v. *The Fair American*, 1 Pet. Adm., 94.

But admitting a concurrent jurisdiction, it is obvious that, apart from the defects of justice which must often be felt from the inability of a court of common law to enforce the lien, there are other serious inconveniences arising out of the necessity of bringing separate suits against each of the parties interested, and the impossibility of settling the general average case by one suit, and from the want of power in a court of common law to compel a discovery and the production of books, papers, &c. *Twizell* v. *Allen*, 5 Mees. & W., 337. And that inconvenience is the more forcibly felt in this country where different parties might elect different tribunals, one the common law courts, another the court of chancery; one might prefer to sue in the Federal, and another in the state courts, there being no court having and exercising a complete jurisdiction over the whole subject-matter.

If relief is sought in equity, all the parties may be joined and served, if within the jurisdiction; but if not, the absent parties and their property cannot be bound,—and the lien is as unavailable in equity as at law. It was expressly decided in *Hallett* v. *Bousfield*, 18 Ves., 187, that the court would not, at the instance of a freighter, whose goods had been sacrificed, enjoin the master from delivering the residue of the cargo till the claim was settled and paid.

The inconveniences of the common law jurisdiction over this matter are forcibly stated in 1 Story's Eq. Jur., 542, § 491, and as arising principally from the inability [*628 *to bring all the parties interested before the court in any suit affecting a complete settlement; but the same objections apply to the jurisdiction of the court of equity, if all the parties interested are not within the jurisdiction; the want of power to enforce the lien is as seriously felt there as in a court of common law, and the slow, tedious, expensive proceedings of a court of equity constitute very formidable objections to the practical exercise of its jurisdiction in cases of this nature; and it is in fact very seldom resorted to. In the reports of the United States and state courts I cannot find a case in which a suit for general average has been brought in equity, and in the English reports only two, one above referred to in 18 Vesey, and another in Shower's Parl. Cas., p. 18.

On the other hand, the court of admiralty has all the advan-

tages of a court of equity in such cases, without any of its disadvantages.

If its process *in personam* be resorted to, it is in fact the same thing, except that its proceedings are much less formal, technical, and dilatory; if recourse is had to process *in rem*, the libellant gets the benefit of the lien and preference to which he is entitled at law and in equity; all persons interested are brought directly before the court; the property, if perishable, may be sold, or it may be delivered to the claimants on stipulation; the process, pleadings, and practice are direct, simple, and summary, the practice being, as it has been said, to proceed "*velis alatis*," or under full sail. The decree covers the whole subject-matter, and being *in rem* is conclusive upon all the parties interested, and the whole world.

It might not be easy to imagine a case more fit and proper for so much of its powers, pleadings, and proceedings as are peculiar to a court of admiralty, than one of general average, especially where there are many parties interested.

Another reason in favor of the jurisdiction on this score is that of uniformity of decisions. The different rules, practices, and customs which prevail in relation to general average, the circumstances which give rise to it, and the mode of adjustment, have been a cause of much confusion and embarrassment, and have been greatly lamented by writers on commercial and maritime law.

If the admiralty cannot entertain jurisdiction over this subject, it must be left principally for the jurisdiction of the state courts and different rules and systems of law in relation to it must arise. The jurisdiction of the Federal courts at law and in equity, being dependent on the citizenship of parties, can-
*629] not always or generally be invoked, and the decisions of these *courts, however highly respected, are not conclusive and binding upon the state courts.

If, on the other hand, the admiralty has a rightful jurisdiction, the great advantages of its process will cause it to be exclusively resorted to for the determination of such cases, and the District Courts being bound by the decisions of this tribunal, a uniformity of principle and decision may be established through all the states, the advantages of which in a commercial nation, and where the case is of daily occurrence, can hardly be overstated.

CHARLES G. LORING,
of Counsel for Libellant.

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APPEALS AND WRITS OF ERROR.

1. Where an "action of jactitation" or "slander of title" was brought in a state court of Louisiana and removed into the Circuit Court of the United States by the defendant, who was a citizen of Mississippi (the persons who brought the action being in possession of the land under a legal title), and the defendant pleaded in reconvention, setting up an equitable title, and the court below decreed against the defendant, it was proper for him to bring the case to this court by appeal, and not by writ of error. *Surgett* v. *Lapice*, 48.
2. This case distinguished from that of the *United States* v. *King*, 3d and 7th Howard, 773 and 844. *Ib.*
3. Where a plaintiff in the court below filed a petition for the recovery from the defendant of four slaves, whose value he alleged to be $2700, and the jury found a verdict for the plaintiff "for $1200, the value of the negro slaves in suit," and the plaintiff thereupon released the judgment for $1200, and the court adjudged that he recover of the said defendant the said slaves, the case is within the appellate jurisdiction of this court. *Bennett* v. *Butterworth*, 124.
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1. Where a married woman has power, under a marriage settlement, to dispose of property settled upon her, by the execution of a power of appointment for that purpose, and alleges afterwards that she executed the power under undue marital influence and through fraud practised upon her, but alleges no specific mode or act by which this undue marital influence was exerted, and the facts disclosed in the testimony go very far to contradict the allegation, the charge cannot be sustained. *Ladd* v. *Ladd*, 10.
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3. Where the marriage settlement recited that the woman was possessed of

CHANCERY — Continued.

a testator's real and personal estate, which it was agreed should be sold, [illegible] the will to vest in trustees for the purpose of the same by advertisement or private sale, and upon payment into the trustees should permit her to take, receive, and enjoy all the interest, rents, and profits of the property to her own use, or to the use of such persons as she might from time to time appoint during the coverture, or in such person as she by her last will and testament might devise or will the same to, and in default of such appointment to devise, then the estate and interest of real [illegible] to those who might be entitled thereto by [illegible] — held that she was to receive the whole fee, under the deed, and not merely the annual interest, rents, and profits. *Ib.*

4. Where the marriage articles provided that she should have the power of appointment to the use of such persons as she might from time to time appoint, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses, and she executed a deed which recited that the parties had thereunto set their hands and seals, and which the witnesses attested as having been sealed and delivered, this was a sufficient execution of the power, although the witnesses did not attest the fact of her signing it. *Ib.*
5. The authorities upon this point examined. *Ib.*
6. Where false steps are taken to enhance the price of property sold at auction, a court of equity will relieve the purchaser from the consequences and injury caused by these unfair means. *Veazie* v. *Williams*, 134.
7. Therefore, where the owners had instructed the auctioneer to take $14,500 for the property, and the real bids stopped at $39,000, and the auctioneer, even without the consent or knowledge of the owner, continued to make fictitious bids until he ran it up to $40,000, this was a fraud upon the purchaser. *Ib.*
8. These sham bids could not have been made by the auctioneer upon his own account. Even if they had been so, it is very questionable whether they would have been valid. *Ib.*
9. Being the general agent of the owners, the latter are responsible for his acts if they receive the benefit of them. By-bidding or puffing by the owners, or caused by or ratified by them, is a fraud, and avoids the sale. *Ib.*
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14. A deed from a female child, just of age, and living with her parents, made to a trustee for the benefit of one of those parents, founded on no real consideration, executed under the influence of misrepresentation by the parents, and containing in its preamble a recital of false statements, ordered to be set aside, and the property reconveyed to the grantor. *Taylor* v. *Taylor*, 183.
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18. Where a bill was filed in the Circuit Court of the United States for the County of Alexandria, by a legatee, against the executor and resid-

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uary devisee, praying for the sale of the real estate in order to pay legacies, the personal estate being exhausted, it was not necessary to make a special devisee of land in Virginia, who resided in Virginia, a party defendant. *West* v. *Smith*, 402.
19. The Orphans' Court had power to allow a commission to the executor for paying over a specific legacy, and a right to extend this commission to ten per cent. *Ib.*
20. Under the laws of Virginia, the executor had a right to refrain from pleading the statute of limitations when sued, and to pay a judgment thus obtained against him. The judgment, at all events, must stand good until reversed. *Ib.*
21. Where the executor paid legacies to persons who had occupied property, which, it was alleged, belonged to the deceased, and the occupiers claimed to hold it in consequence of an uninterrupted possession of twenty years, the justice of their claim could not be tried in a collateral manner, by objecting to this item of the executor's account, on the ground that he should have set up the claim for rent in set-off to the legacy. *Ib.*
22. A merchant who owed debts upon his own private account, and was also a partner in two commercial houses which owed debts upon partnership account, executed a deed of trust containing the following provisions, viz.:—
23. It recited a relinquishment of dower by his wife in property previously sold and in the property then conveyed, and also a debt due to the daughter of the grantor, which was still unpaid, and then proceeded to declare that he was indebted to divers other persons residing in different parts of the United States, the names of whom he was then unable to specify particularly, and that the trustee should remit from time to time to Alexander Neill, of the first moneys arising from sales, until he shall have remitted the sum of $15,000, to be paid by the said Neill to the creditors of the said grantor, whose demands shall then have been ascertained; and if such demands shall exceed the sum of $15,000, then to be divided amongst such creditors *pari passu*; and out of further remittances there was to be paid the sum of $12,000 to his wife as a compensation for her relinquishment of dower, and next the debt due to his daughter, and after that the moneys arising from further sales were to be applied to the payment of all the creditors of the grantor whose demands shall then have been ascertained. In case of a surplus, it was to revert to the grantor. *Murrill* v. *Neill*, 414.
24. The construction of this deed must be, that the grantor intended to provide for his private creditors only out of this fund, leaving the partnership creditors to be paid out of the partnership funds. *Ib.*
25. Under the deed, it was the duty of the trustee to divide the first $15,000 amongst the private creditors of the grantor, and exclude from all participation therein the creditors of the two commercial houses with which the grantor was connected; next to pay the debts due to the wife and daughter; then to pay in full the private creditors, or divide the amount amongst them, proportionally. *Ib.*
26. The rule is, that partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners, with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid. *Ib.*
27. The American and English cases respecting this rule examined. *Ib.*
28. Mary Clarke devised to Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and their heirs forever, as joint tenants, and not as tenants in common, "all that part of my said farm at Greenwich aforesaid, called Chelsea, &c., to have and to hold the said hereby devised premises to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and to the heirs of such survivor, as joint tenants, and not as tenants in common, in trust, to receive the rents, issues, and profits thereof, and to pay the same to Thomas B. Clarke, &c., during his natural life, and

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from and after the death of Thomas B. Clarke, in further trust, to convey the same in fee to the lawful issue of the said Thomas B. Clarke, living at his death." Under this devise, the first-born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let in his other children to the like estate, as they were successively born, and such vested remainder became a fee simple absolute in the children living, on the death of their father. *Williamson* v. *Berry*, 496.

29. The acts of the legislature of New York passed for the relief of Thomas B. Clarke show that he was made the trustee of the property devised, to sell or mortgage a part of it, with the assent or appointment of the Chancellor. *Ib.*

30. His obligation was to account annually for the proceeds of every sale or mortgage which might be made, and it was his right to use the interest of the principal for himself and for the education and maintenance of his children. *Ib.*

31. The acts of the legislature discharged the trustees named in the devise, whatever may have been their estate in the land under it, but did not vest an estate in fee in Thomas B. Clarke. *Ib.*

32. The acts of the legislature for the relief of Clarke are private acts. They provide that the Chancellor may act upon them summarily, upon the petition of Clarke, upon which orders are given, as contradistinguished from decrees in suits by bill filed. The last are judgments upon the matters in controversy between the parties before the court. The other are orders in conformity with a legislative act in a particular case. Whatever the Chancellor does in either case, he does as a court of chancery. It will stand when it has been done within the jurisdiction conferred by the private act, until it has been set aside upon motion, as his decrees in suits upon bill filed do, until they have been set aside by a bill of review. *Ib.*

33. In such a case the court will not deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction, and partly upon the statute. It cannot confound its original jurisdiction in a suit with the powers it may be authorized to execute by petition, either in a public act giving statutory jurisdiction to the court, to be exercised summarily upon petition, or in a private act providing for relief in a particular case, which is to be carried out by the same mode of procedure. *Ib.*

34. In these acts for the relief of Clarke, what the Chancellor can do is precisely stated. No authority was given to him, in giving his assent to Clarke's making sales of any part of the devised premises, to order that Clarke might make sales of any portion of it, in payment and satisfaction of any debt or debts due and owing by Clarke, upon a valuation to be agreed upon between him and his respective creditors. Or that Clarke might take the money arising from the sales of the premises, and apply the same to the payment of his debts, investing the surplus only in such manner as he may deem proper to yield an income for the maintenance and support of his family. This was not an exercise of jurisdiction, but an order out of and beyond it. *Ib.*

35. These were private acts for the alienation of land, to be made with the assent of the Chancellor that there might be an assurance by matter of record, under his sanction, of a transfer of the property to such as might become purchasers from Clarke. *Ib.*

36. Neither orders summarily given upon petition in chancery, nor decrees in suits upon bill filed, can be summarily reviewed as a whole in a collateral way. *Ib.*

37. But it is a well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings. *Ib.*

38. The rule applies to the case in hand, though it may have been decided by the highest tribunal in New York, that the Chancellor had jurisdiction, under the acts for the relief of Clarke, to give the order permitting him to sell the property to his creditors, in payment of his

CHANCERY—(*Continued.*)
debts, for though this court will recognize as a rule for its judgments the decisions of the highest courts of the states relative to real property as a part of the local law, it does not recognize as in any way binding upon them, as a part of the local law, the decisions of the state courts upon private acts of any kind, or such of them as provide for the alienation of private estates, by particular persons, with the sanction of a court or of the Chancellor. Decisions upon private acts form no part of the local law of real property. They concern only those for whose benefit they are made, and can be no rule for any other case. *Ib.*

39. This court decides that, under the acts of New York, the Chancellor had not the jurisdiction to give an order, permitting Clarke to convey any part of the devised premises in satisfaction of his debts, and that neither De Grasse, nor his alienee Berry, can derive from the order of the Chancellor, or from the conveyance by Clarke to De Grasse, any title to the premises in dispute. *Ib.*

40. *Sale* is a word of precise legal import, both at law and in equity. It means a contract between parties to take and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold. *Ib.*

41. A sale ordered, decreed, or permitted by a chancellor, subject to the approval of a master, requires the master's approval, and confirmation by the court, before a purchaser can have a legal title to the estate that he means to buy or has bid for under the decree of the court. *Ib.*

42. In any sale under a decree or order in chancery, the purchaser, before he pays his money, must not only satisfy himself that the title to the property to be sold is good, but he must take care that the sale has been made according to the decree or order. *Ib.*

43. If he takes under an imperfect sale, he must abide the consequence. *Ib.*

44. The sale in this instance by Clarke to De Grasse, if it were otherwise good, which it is not, would be a nullity, for it wants the approval by the master to whom the execution of the order was confided by the Chancellor. *Ib.*

45. Nor was Clarke's sale to De Grasse a judicial sale. By judicial sale is meant one made under the process of a court, having competent authority to order it, by an officer legally appointed and commissioned to sell. *Ib.*

46. In order that the sale by Clarke to De Grasse should be a judicial sale, it was requisite that the Chancellor should have had the authority to direct a sale of the premises to his creditors for their demands, and that it should have been approved by the master in the way the order directed it to be done. *Ib.*

47. The circumstance, that the defendants paid to the grantees of George De Grasse a valuable consideration for the premises in dispute, does not give them a valid title against the plaintiffs. *Williamson* v. *Irish Presbyterian Congregation*, 565.

48. Under the acts of the Legislature of New York for the relief of Thomas B. Clarke, the Chancellor had no authority to order that the trustee might make a conveyance of any part of the premises devised for a precedent debt due by the trustee to his grantee. *Williamson* v. *Ball*, 566.

49. The deed executed by Clarke to Chrystie in this case was not made in the due execution of the power and authority to sell and convey, though approved by the master in conformity with the Chancellor's order, it not having been within the Chancellor's jurisdiction to order that the trustee might make a conveyance of the premises to a creditor in payment of the debt. *Ib.*

50. Although the defendant in this case may have paid to such a grantee a valuable consideration, yet he cannot be said to have acquired any title against the plaintiffs; inasmuch as Clarke had no lawful authority to convey to his grantee, that grantee had no right to convey to another. *Ib.*

51. Some of the distinctions stated between bills of review, of revivor, and supplemental and original bills. *Kennedy* v. *Georgia Bank*, 586.

52. A decree for a sale made with the approbation of counsel filed in court, removes all preceding technical objections. *Ib.*

COASTING TRADE.

1. The sixteenth section of the act of Congress, passed on the 18th of February, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," (1 Stat. at L., 305,) prescribes the manner in which foreign merchandise shall be specified in the manifest of a vessel going coastwise, and imposes a pecuniary penalty upon the master for failing to comply with it; but does not forfeit the goods. *United States* v. *Carr*, 1.
2. The forfeiture provided in the seventeenth section was intended to apply to cases where the foreign merchandise was not included at all in the manifest, and not to cases where it was included in fact, although not with legal precision, and where there was no bad faith. *Ib.*
3. The act of May 31st, 1844 (5 Stat. at L., 658), gives jurisdiction to this court in revenue cases, without regard to amount, only where the judgment is rendered in a Circuit Court of the United States. Therefore, where the case was brought from the Court of Appeals for the territory of Florida, and the amount in controversy did not exceed one thousand dollars, the case must be dismissed for want of jurisdiction. *Ib.*

COMMERCIAL LAW.

For cases relating to Partnership see CHANCERY, 23-27.

1. The sixteenth section of the act of Congress, passed on the 18th of February, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," (1 Stat. at L., 305,) prescribes the manner in which foreign merchandise shall be specified in the manifest of a vessel going coastwise, and imposes a pecuniary penalty upon the master for failing to comply with it; but does not forfeit the goods. *United States* v. *Carr*, 1.
2. The forfeiture provided in the seventeenth section was intended to apply to cases where the foreign merchandise was not included at all in the manifest, and not to cases where it was included in fact, although not with legal precision, and where there was no bad faith. *Ib.*
3. By the statutes of Mississippi, the holder of an inland bill of exchange is entitled to recover of an indorser the amount due on the bill, with interest, upon giving the customary proof of default and notice. A protest is necessary only for the purpose of enabling him to recover the five per cent. damages given by the act. *Wanzer* v. *Tupper*, 234.
4. The case of *Bailey* v. *Dozier* (6 How., 23) confirmed. *Ib.*
5. Where personal property is, from its character or situation at the time of the sale, incapable of actual delivery, the delivery of the bill of sale, or other evidence of title, is sufficient to transfer the property and possession to the vendee. *Gibson* v. *Stevens*, 384.
6. Where articles of commerce were purchased in the state of Indiana, and the vendors, in whose warehouses they were lying, gave a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal-boats soon after the opening of canal navigation, these documents transferred the property and the possession of the articles to the purchasers. *Ib.*
7. These documents, being indorsed and delivered to a merchant in New York, in consideration of advances of money in the usual course of trade, transferred to him the legal title and constructive possession of the property. *Ib.*
8. Therefore an attachment subsequently issued, at the instance of a creditor of the original purchasers, which was levied upon the property in question, could not be maintained. *Ib.*
9. This court will judicially recognize this branch of trade. It has existed long enough to assume a regular form of dealing, and its ordinary course and usages are now publicly known and understood. *Ib.*
10. The New York merchant stood in the position of an actual purchaser to the extent of his advances, and not in that of a factor who had made advances upon goods in his possession. *Ib.*
11. A guarantee by the first sellers that the articles should pass inspection did not change the original sale into an executory contract. It was nothing more than the usual warranty of the soundness of the goods sold. *Ib.*
12. Where a manufacturer upon the upper waters of the Potomac shipped five hundred kegs of nails to Alexandria, taking from the master of the

COMMERCIAL LAW—(*Continued.*)
canal-boat a receipt saying that the nails were "to be delivered to Fowle & Sons in Alexandria, for the use of Robert Gilmor of Baltimore," and on the same day sent a letter to the consignees, advising them that the goods were consigned for the use of Gilmor, such delivery and bill of lading operated as a transfer of the legal title to Gilmor, who was in fact the consignor. *Grove* v. *Brien*, 429.

13. The effect of a consignment of goods, generally, is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage. *Ib.*

14. Therefore, the kegs of nails in the hands of Fowle & Sons were not subject to an attachment by the creditors of the manufacturer; nor had Fowle & Sons any valid lien upon them for previous advances to him. The title to the nails had passed to Gilmor before they came into the possession of Fowle & Sons. *Ib.*

15. In this case the manufacturer acted *bonâ fide*, in the transfer of the goods, for the purpose of securing a pre-existing debt to Gilmor. This being so, there was no necessity for Gilmor's expressing his assent to the transfer, in order to the vesting the title. The manufacturer was a competent witness. *Ib.*

CONSTITUTIONAL LAW.

1. A tax imposed by a state upon all money or exchange brokers is not void for repugnance to the constitutional power of Congress to regulate commerce. *Nathan* v. *Louisiana*, 73.

2. Foreign bills of exchange are instruments of commerce, it is true; but so also are the products of agriculture or manufactures, over which the taxing power of a state extends until they are separated from the general mass of property by becoming exports. *Ib.*

3. A state has a right to tax its own citizens for the prosecution of any particular business or profession within the state. *Ib.*

4. Banks deal in bills of exchange, and this court has recognized the power of a state to tax banks, where there is no clause of exemption in their charters. *Ib.*

5. This court refrains from expressing an opinion as to the right of state legislation to compel foreign creditors, in *all* cases, to seek their remedy against the estates of decedents in the state courts alone, to the exclusion of the jurisdiction of the courts of the United States. *Williams* v. *Benedict*, 107.

6. In 1829, the legislature of Virginia passed an act appointing five commissioners to raise by way of lottery or lotteries the sum of $30,000 for the benefit of the Fauquier and Alexandria Turnpike Road Company. Two of the commissioners declined to act, and the remaining three took no steps to execute the power for a long time. *Phalen* v. *Virginia*, 163.

7. On the 25th of February, 1834, the legislature passed an act for the suppression of lotteries, which prohibited all lotteries and sale of lottery-tickets after the 1st of January, 1837, saving, however, contracts already made which were by their terms to extend beyond the 1st of January, 1837, or contracts hereafter to be made under any existing law, which were to extend beyond that day. These were permitted to go on until the 1st of January, 1840. *Ib.*

8. On the 11th of March, 1834, the legislature passed an act appointing two commissioners in the place of the two who had declined to act. *Ib.*

9. On the 19th of December, 1839, these commissioners entered into a contract with certain persons, authorizing these persons to draw as many lotteries as they might think proper, without limitation as to time, upon the payment of a certain sum per annum to the commissioners. *Ib.*

10. The right to draw lotteries under the act of 1829 is not a contract the obligations of which were impaired by the act of 1834. *Ib.*

11. It may be doubted whether it constitutes a contract at all. But if it was a contract, it was not unlimited as to time, and the act of 1834, allowing the grant to continue for a certain time, stands upon the same ground as acts of limitation and recording acts, which this court has said a state has a right to pass. *Ib.*

12. The privilege granted by the act of 1829 had become obsolete from non-user, and the act of 1834, appointing two commissioners, did not fully

CONSTITUTIONAL LAW—(*Continued.*)
revive it, because the two acts of 1834 must be taken together; and the limitation contained in one must apply to the other. *Ib.*
12. The courts of Virginia have so construed these statutes, and this court adopts their construction. *Ib.*
14. The act of Congress which restrains the Circuit Courts from taking cognizance of any suit to recover the contents of a chose in action brought by an assignee, when the original holder could not have maintained the suit, is not inconsistent with the third article of the Constitution of the United States, which gives to the judicial power cognizance over controversies between citizens of different states. *Sheldon* v. *Sill*, 441.
15. By a law of the state of Louisiana, every person not being domiciliated in that state, and not being a citizen of any state or territory in the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, shall pay a tax to the state of ten per cent. of the value thereof. *Mager* v. *Grima*, 490.
16. This law is not repugnant to the Constitution of the United States. *Ib.*
CONSTRUCTION.
Of Statutes. See STATUTES.
Of Deeds. See CHANCERY, 1–4; 14, 15; 22–27; DEEDS.
Of Wills. See WILLS.
CONTEMPT.
1. *It seems* that to obtain the opinion of the court, affecting the rights of third persons not parties to such suit, is punishable as a contempt of court. *Lord* v. *Veazie*, 251.
CUSTOM.
1. A custom cannot be set up against a settled rule; nor can it ever be binding unless it be ancient, reasonable, generally known, and certain. *United States* v. *Buchanan*, 83.
DEEDS, CONSTRUCTION OF.
See JURY, 3, 4; CHANCERY, 1–5; 14, 15; 22–27.
1. Where a power of attorney authorized the agent "to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased," and "on such terms in all respects as he shall deem most advantageous," and "to execute deeds of conveyance necessary for the full and perfect transfer of all our respective right, title, &c., as sufficiently in all respects as we ourselves could do personally in the premises," these expressions, aided by the situation of the parties and the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing upon the question, must be construed as giving to the agent the power to enter into a covenant of seizin. *LeRoy* v. *Beard*, 451.
2. Some of the general rules stated for the construction of powers. *Ib.*
DUTIES.
See FINES, PENALTIES, AND FORFEITURES, 1–7.
EJECTMENT.
1. Where a testator made certain devises to his two grandchildren, "provided, and the legacies herein before devised are upon this special condition, that, if both my said grandchildren shall happen to die under age and without any lawful issue, then it is my will that three fourth-parts shall be equally divided between Sarah Smallwood and others," &c., and the two grandchildren lived many years after they arrived at full age, and then both died without issue, the devise over to Sarah Smallwood, &c., never took effect, because the two grandchildren both arrived at full age. *Doe* v. *Watson*, 263.
2. The plaintiffs below having claimed the whole as the heirs of Sarah Smallwood, the court instructed the jury that they could not recover. But the plaintiffs below claimed, in this court, that they were entitled to recover a part, because they were a portion of the heirs of the two grandchildren. This point was not made in the court below, and therefore cannot be made here. *Ib.*
3. The Supreme Court of Pennsylvania decided, with regard to this very will, that the devise over to Sarah Smallwood never took effect. This decision was made in 1795, and the acquiescence of half a century

EJECTMENT—(*Continued.*)
would seem to close all litigation under the will. But even if it did not, this court is of the same opinion. *Ib.*

EQUITY.
See CHANCERY.

ERROR.
See APPEALS AND WRITS OF ERROR.

EVIDENCE.
1. Where an action was brought upon a policy of insurance against fire, by the assignees of the person originally insured, and in the policy it was said that it was "made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had," it was proper to prove by parol testimony that the representations alleged to have been made by the party originally insured were actually made by him. *Clark* v. *Manufacturers' Ins. Co.*, 235.
2. And if the assignees, by their acts, adopted these representations, when renewing the policy from time to time, the evidence was equally admissible, because the subsequent policies had reference to the one first made. *Ib.*

EXECUTORS AND ADMINISTRATORS.
1. The laws of Mississippi direct that, where the insolvency of the estate of a deceased person shall be reported to the Orphans' Court, that court shall order a sale of the property, and distribute the proceeds thereof amongst the creditors *pro rata*, and that in the meantime no execution shall issue upon a judgment obtained against such insolvent estate. *Williams* v. *Benedict*, 107.
2. A judgment obtained against the administrator *before* the declaration by the Orphans' Court of the insolvency of the estate, is not, upon that account, entitled to a preference; but must share in the general distribution. *Ib.*
3. The assent of an executor must be obtained before a legatee can take possession of a legacy. But this assent may be implied, and an assent to the interest of the tenant for life in a chattel inures to vest the interest of the remainder. Therefore, where a bill averred the possession of the subject of the legacy by the life-tenant in pursuance of the bequest in the will, and this bill was demurred to, it is sufficient to raise a presumption that the possession was taken with the assent of the executor. *McClanahan* v. *Davis*, 170.
4. By the laws of Virginia, where there is a tenancy for life in a slave, with remainder to the wife of another person, the interest of the husband in the wife's remainder is placed upon the footing of an interest in a chose in action. If, therefore, he survives the wife, he may reduce the property into possession at the expiration of the life estate; but if he be dead at such expiration, the property survives to the wife, and on her death passes to her legal representative as part of her assets. *Ib.*
5. Query, whether the husband or his personal representative is not bound to administer upon the wife's estate, before bringing suit to recover property so situated in the state of Virginia. *Ib.*
6. Where there was no direct or positive averment that the defendants, or either of them, had any interest in the property claimed, or that it was in their possession, no ground of relief against those parties was shown, and the right to a discovery as incidental thereto, failed also. *Ib.*
7. The Orphans' Court of Alexandria had power to allow a commission to the executor for paying over a specific legacy, and a right to extend this commission to ten per cent. *West* v. *Smith*, 402.
8. Under the laws of Virginia, the executor had a right to refrain from pleading the statute of limitations when sued, and to pay a judgment thus obtained against him. The judgment, at all events, must stand good till reversed. *Ib.*
9. Where the executor paid legacies to persons who had occupied property which, it was alleged, belonged to the deceased, and the occupiers claimed to hold it in consequence of an uninterrupted possession of twenty years, the justice of their claim could not be tried in a collateral manner by objecting to this item of the executor's account, on the ground that he should have set up the claim for rent in set-off to the legacy. *Ib.*

FINES, PENALTIES AND FORFEITURES.

1. The sixteenth section of the act of Congress, passed on the 18th of February, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same" (1 Stat. at L., 305), prescribes the manner in which foreign merchandise shall be specified in the manifest of a vessel going coastwise, and imposes a pecuniary penalty upon the master for failing to comply with it; but does not forfeit the goods. *United States* v. *Carr et al.*, 1.
2. The forfeiture provided in the seventeenth section was intended to apply to cases where the foreign merchandise was not included at all in the manifest, and not to cases where it was included in fact, although not with legal precision, and where there was no bad faith. *Ib.*
3. In this case, the court below instructed the jury, that if the goods were fraudulently entered, it was no matter in whose possession they were when seized, or whether the United States had made an election between the penalties, and that the forfeiture took place when the fraud, if any, was committed, and the seller of the goods could convey no title to the purchaser. *Caldwell* v. *United States*, 366.
4. This instruction was right in respect to the sixty-eighth section of the act of 1799 (1 Stat. at L., 677), as the penalty is the forfeiture of the goods *without an alternative of their value*, but wrong as the instruction applies to the sixty-sixth section of the same act,—as the forfeiture under it is either the goods *or their value*. *Ib.*
5. Under the sixty-eighth section, the forfeiture is the statutory transfer of right to the goods at *the time* the offence is committed. The title of the United States to the goods forfeited is not consummated until after judicial condemnation, but the *right to them* relates backwards to the time the offence was committed, so as to avoid all intermediate sales of them between the commission of the offence and condemnation. *Ib.*
6. But under the sixty-sixth section of the act, in which the forfeiture is the goods *or their value*, the United States have no title in the goods, until an election has been made either to recover the goods or their value. Therefore, under that section, any rights in the goods acquired *bonâ fide* by third persons in the meantime are protected. *Ib.*
7. The claimants prayed the court to instruct the jury, that the United States were not entitled to recover under the first and second counts of the information founded on the fiftieth section, unless the goods were unladen and delivered without permits. The jury was told, in reply,—"If the permits were obtained by fraud and improper means, they were of no effect, and a mere nullity. The United States are entitled to recover, if the goods were imported with the view to defraud the revenues." Whether or not the permits were obtained by fraud or improper means was a point in the cause for the jury to decide, and what the court said upon the prayer was virtually saying to the jury, that a verdict might be returned upon the first and second counts against the claimants, and that they were liable to the penalties of the act for unlading goods without a permit, without saying if they thought that there was evidence enough to prove the fact against them. *Ib.*

FRAUDS ON THE GOVERNMENT.

1. Where an act of Congress declared, that, if any person "shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; every such person shall be deemed and adjudged guilty of felony," &c.—it was sufficient that the indictment charged the act to have been done "with intent to defraud the United States," without also charging that it was done feloniously, or with a "felonious intent." *United States* v. *Staats*, 41.
2. Where the act done was the transmission to the Commissioner of Pensions of an affidavit which was false in the facts which it professed to narrate, although sworn to by a person who really existed, and the person who transmitted it knew that it was false, it was an offence within the meaning of the act of Congress. *Ib.*

HUSBAND AND WIFE.
See CHANCERY, 1-5; EXECUTORS AND ADMINISTRATORS, 4, 5.
INDICTMENT.
1. Where an act of Congress declared, that, if any person "shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; every such person shall be deemed and adjudged guilty of felony," &c.,—it was sufficient that the indictment charged the act to have been done "with intent to defraud the United States," without also charging that it was done feloniously, or with a "felonious intent." *United States* v. *Staats*, 41.
2. Where the act done was the transmission to the Commissioner of Pensions of an affidavit which was false in the facts which it professed to narrate, although sworn to by a person who really existed, and the person who transmitted it knew that it was false, it was an offence within the meaning of the act of Congress. *Ib.*
INSOLVENCY.
1. The rule is, that partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners, with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid. *Murrill* v. *Neill*, 414.
INSURANCE.
1. Where an action was brought upon a policy of insurance against fire, by the assignees of the person originally insured, and in the policy it was said that it was "made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had," it was proper to prove by parol testimony that the representations alleged to have been made by the party originally insured were actually made by him. *Clark* v. *Manufacturers' Ins. Co.*, 235.
2. And if the assignees, by their acts, adopted these representations, when renewing the policy from time to time, the evidence was equally admissible, because the subsequent policies had reference to the one first made. *Ib.*
3. Therefore, where the representation upon which the original policy was founded was, that "the picker is inside of the building, but no lamps used in the picking-room," it was a correct instruction to give to the jury, that the use of lamps in the picker-room rendered the policy void. *Ib.*
4. But if no representations were made or asked, it would not be the duty of the insured to make known the fact that lamps were used in the picker-room, although the risk might have been thereby increased, unless the use of them in that way was unusual. *Ib.*
JURISDICTION.
1. The act of May 31st, 1844 (5 Stat. at L., 658), gives jurisdiction to this court in revenue cases, without regard to amount, only where the judgment is rendered in a Circuit Court of the United States. Therefore, where the case was brought from the Court of Appeals for the territory of Florida, and the amount in controversy did not exceed one thousand dollars, the case must be dismissed for want of jurisdiction. *United States* v. *Carr*, 1.
2. The act of 1824, relating to certain claimants to lands, which was revived and re-enacted by the act of 1844, did not expire in five years from the passage of the act of 1844, so far as regards appeals from the District Court to this court. It will continue in force until all the appeals regularly brought up from the District Courts shall be finally disposed of *United States* v *Boisdoré's Heirs*, 113.
3. Where a plaintiff in the court below filed a petition for the recovery from the defendant of four slaves, whose value he alleged to be $2700, and the jury found a verdict for the plaintiff "for $1200, the value of the

JURISDICTION—(*Continued.*)
negro slaves in suit," and the plaintiff thereupon released the judgment for $1200, and the court adjudged that he recover of the said defendant the said slaves, the case is within the appellate jurisdiction of this court. *Bennett* v. *Butterworth*, 124.

4. The plaintiff averred in his petition, that the slaves were worth $2700, and by his releasing the judgment for $1200, the only question before this court is the right to the property. And as the defendant below prosecuted the appeal, the plaintiff cannot be allowed to deny here the truth of his own averment of the value of the property in dispute. *Ib.*

5. Where it appears to this court, from affidavits and other evidence filed by persons not parties to a suit, that there is no real dispute between the plaintiff and defendant in the suit, but, on the contrary, that their interest is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the Circuit Court entered *pro forma* is a nullity and void, and no writ of error will lie upon it. It must, therefore, be dismissed. *Lord* v. *Veazie*, 251.

6. The following question, sent up to this court upon a certificate of division in opinion between the judges of the Circuit Court,—viz., "Whether, according to the true construction of the Woodworth patent, as amended, the machines made or used by the defendant at the time of filing the bill, or either of them simply, do or do not infringe the said amended letters patent,"—is a question of fact, over which this court has no jurisdiction. *Wilson* v. *Barnum*, 258.

7. The jurisdiction given to it by statute in certified cases only extends to points of law. *Ib.*

8. Courts created by statute can have no jurisdiction but such as the statute confers. *Sheldon* v. *Sill*, 441.

9. Therefore, where the third article of the Constitution of the United States says that the judicial power shall have cognizance over controversies between citizens of different states, but the act of Congress restrains the Circuit Courts from taking cognizance of any suit to recover the contents of a chose in action brought by an assignee, when the original holder could not have maintained the suit, this act of Congress is not inconsistent with the Constitution. *Ib.*

10. A debt secured by bond and mortgage is a chose in action. *Ib.*

11. Therefore, where the mortgagor and mortgagee resided in the same state, and the mortgagee assigned the mortgage to the citizen of another state, this assignee could not file his bill for foreclosure in the Circuit Court of the United States. *Ib.*

12. The jurisdiction of a chancellor under a private act of the Legislature examined. *Williamson* v. *Berry*, 496.

13. The jurisdiction of this court, under the twenty-fifth section of the Judiciary Act, extends to a review of the judgment of a state court, where the point involved was the alleged violation of a contract granting a ferry right by a state to an individual; but it does not extend to a case where the alleged violation of a contract is, that a state has taken more land than was necessary for the easement which it wanted, and thus violated the contract under which the owner held his land by a patent. It rests with state legislatures and state courts exclusively to protect their citizens from injustice and oppression of this description. *Mills* v. *St. Clair County*, 569.

14. This court, as an appellate court, has the power to allow amendments to be made to the record before it, although the general practice has been to remand the case to the Circuit Court for that purpose. *Kennedy* v. *Georgia Bank*, 586.

15. When a cause is brought before this court on a division in opinion between the judges of the Circuit Court, the points certified only are before it. The cause should remain on the docket of the Circuit Court, and at their discretion may be prosecuted. *Ib.*

16. If the jurisdiction of a Circuit Court be not shown in the proceedings in the case, its judgment is erroneous, and liable to be reversed; but it is not an absolute nullity. *Ib.*

17. But when an amendment to the record was made by consent of counsel in this court, which amendment set forth the jurisdiction, a mandate

JURISDICTION—(*Continued.*)
containing that amendment ought to have prevented any subsequent objection to the jurisdiction in the Circuit Court. *Ib.*

JURY.
1. The question, whether or not certain acts were part of the official duty of pursers, was one of law, to be decided by the court, and not one of fact to be left to the jury. *United States* v. *Buchanan*, 88.
2. The following question sent up to this court upon a certificate of division in opinion between the judges of the Circuit Court,—viz, "Whether, according to the true construction of the Woodworth patent as amended, the machines made or used by the defendant at the time of filing the bill, or either of them simply, do or do not infringe the said amended letters patent,"—is a question of fact, over which this court has no jurisdiction. *Wilson* v. *Barnum*, 258.
3. It is the duty of the court to give a construction to a deed so far as the intention of the parties can be elicited therefrom; but the doubt in the application of the descriptive portion of a deed to external objects usually arises from what is called a latent ambiguity, which has its origin in parol testimony and must necessarily be solved in the same way. It therefore, in such cases, becomes a question to be decided by a jury, what was the intention of the parties to a deed. *Reed* v. *Proprietors of Locks and Canals*, 274.
4. Therefore, there was no error in the following instructions given by the court to the jury, viz.:—"That if the jury believed from the evidence, looking to the monuments, length of lines, and quantities, actual occupation, &c., that it was more probable that the parties to the mortgage intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants." *Ib.*
5. In a trial for a fraudulent entry of goods, the question whether the permits were obtained by fraud or improper means was a point for the jury to decide. *Caldwell* v. *United States*, 366.

LACHES. See LIMITATIONS OF SUITS.

LANDS, PUBLIC.
1. Before the transfer of Louisiana to the United States, the Spanish government was accustomed to grant lands fronting on the Mississippi River, and reserve the lands behind those thus granted for the use of the front proprietors, who had always a right of preëmption to them. *Surgett* v. *Lapice*, 48.
2. After the transfer, Congress recognized this right of preëmption by several laws. *Ib.*
3. In 1832, Congress passed an act (4 Stat. at L., 534) giving to the proprietors of any tracts bordering on a river, creek, bayou, or water-course, the right of preference in the purchase of any vacant tract of land adjacent to and back of his own tract, provided that the right of preëmption should not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water-course, and provided that all notices of claims shall be entered, and the money paid thereon, at least three weeks before such period as may be designated by the President of the United States for the public sale of the lands in the township. *Ib.*
4. This last proviso cannot be construed to apply to a township where the lands had already been exposed to sale by order of the President in 1829. The act having been passed in 1832, a compliance with it was impossible, and it must, therefore, be construed as applying prospectively to those lands which had not been exposed to public sale. *Ib.*
5. The first proviso related only to a river, creek, bayou, or water-course which was a navigable stream. The bayou in question was not so, as is shown by the evidence in the case, and also by the fact that the sections of land, as laid out by the public surveyor, cross it. When the surveyor comes to navigable streams, he bounds upon the shore, and makes fractional sections. *Ib.*
6. In order to bring land within the exception, it must be fit for cultivation, and also border on another river, &c. The two circumstances are coupled together, and both must concur, or else the exception does not apply. *Ib.*
7. In 1824, Congress passed an act (4 Stat. at L., 52), entitled "An act

LANDS, PUBLIC—(*Continued.*)
enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims." *United States* v. *Boisdoré's Heirs*, 113.

8. The second section provided that, in "all cases, the party against whom the judgment or decree of the said District Court may be finally given, shall be entitled to an appeal, within one year from the time of its rendition, to the Supreme Court of the United States"; and the fifth section enacted that any claim which shall not be brought by petition before the said courts within two years from the passing of the act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred. *Ib.*

9. In 1844, Congress passed another act (5 Stat. at L., 676), entitled "An act to provide for the adjustment of land claims within the States of Missouri, Arkansas, and Louisiana, and in those parts of the States of Mississippi and Alabama, south of the thirty-first degree of north latitude, and between the Mississippi and Perdido Rivers." *Ib.*

10. It enacted, "that so much of the expired act of 1824 as related to the State of Missouri be, and is hereby, revived and reënacted, and continued in force for the term of five years, and no longer; and the provisions of that part of the aforesaid act hereby revived and reënacted shall be, and hereby are, extended to the States of Louisiana and Arkansas, and to so much of the States of Mississippi and Alabama as is included in the district of country south of the thirty-first degree of north latitude, and between the Mississippi and Perdido Rivers." *Ib.*

11. The act of 1824, revived and reënacted by the act of 1844, did not expire in five years from the passage of the act of 1844, so far as regards appeals from the District Court to this court. It will continue in force until all the appeals regularly brought up from the District Courts shall be finally disposed of. *Ib.*

12. The plaintiff in a writ of right produced a patent from the United States, dated in 1839, which contained sundry recitals, referring to titles of anterior date derived from acts of Congress for the adjustment of claims to lands. But the patent itself was issued under an act of Congress in 1836. *Marsh* v. *Brooks*, 223.

13. The defendant, in order to show an outstanding title, gave in evidence a treaty between the United States and the Sac and Fox Indians, in which this, with other lands, was reserved for the half-breeds, and an act of Congress passed in 1834 relinquishing the reversionary interest of the United States to these half-breeds. *Ib.*

14. This was sufficient to show an outstanding title. *Ib.*

15. The recitals in a patent are not enough to show that the title is of an earlier date than the patent itself, although they are evidence for some purposes. Nor was it necessary for the defendant to show that any of the half-breeds were in existence at the time of the trial. *Ib.*

16. A concession, having no defined boundaries, made by the Lieutenant-Governor of Upper Louisiana in 1799, but not surveyed, cannot be considered as "property," and, as such, protected by the courts of justice, without a sanction by the political power, under the third article of the treaty with France made in 1803. *Menard's Heirs* v. *Massey*, 293.

17. The Lieutenant-Governor of Upper Louisiana had the authority, as a sub-delegate, to grant concessions, direct surveys, and place grantees in possession; but no perfect title to the land passed until the concession and a copy of the survey were delivered to the Intendant-General at New Orleans, and also a proces-verbal attesting the fact that the survey was made in the presence of the commandant, or in that of a syndic and two neighbors. On these the legal title was founded, and then perfected and recorded. *Ib.*

18. The mere circumstance that another plat, containing different land, was upon the same sheet of paper which contained the genuine plat, and which was filed in the recorder's office, was not sufficient to invalidate the claim; because the name of the claimant was written upon the face of the one describing the tract claimed, and that was the only one before the commissioners. *Ib.*

19. In the case of *Stoddard* v. *Chambers*, 2 How., 284, this court decided by

PUBLIC LANDS—(*Continued.*)
implication, and now decides expressly, that a general and unlocated concession, granted by the Spanish governor prior to the transfer of Louisiana, a private survey of which made after the transfer was recognized by the commissioners appointed under the act of 1805, before whom the claim was filed, was so designated and located as to be reserved from sale by virtue of the act of 1811, and consequently no New Madrid certificate could be located upon it. *Bissell* v. *Penrose*, 317.

20. The act of 1804, forbidding private surveys upon the public lands, was impliedly repealed by the act of 1805, which required claimants to file a plat. The act of 1806 authorized the commissioners to direct such surveys as they might deem necessary, which gave them, thereby, the power to adopt any prior and private surveys which they might deem just and proper, for the purpose of designation and location. *Ib.*

21. The effect of such private surveys was not to sever the land from the public domain, but merely to indicate the tract which Congress was to act upon at a subsequent period, in case it thought proper to confirm the claim. *Ib.*

22. The act of 1836 confirmed the claims of assignees who had prosecuted them as claimants, and did not intend to vest the title in the assignor, the original holder. This court has so decided in former cases. *Ib.*

23. The confirmation by the act of 1836 is equally effectual in favor of the claimant, whether the commissioners recommended that the claim should be confirmed generally, or confirmed "according to the survey." The only difference is, that in the latter case the survey on file is probably conclusive upon the government, and errors cannot be corrected, whilst in the former case they may be. *Ib.*

24. The second section of the act of 1836 makes no provision for a re-location of an unlocated claim confirmed on the report of the commissioners, and further legislation will be necessary for such cases. *Ib.*

25. The cases of *Mackay* v. *Dillon*, 4 How., 421, *Les Bois* v. *Bramell*, 4 Id., 449, and *Jourdan* v. *Barrett*, 4 Id., 169, examined and explained. *Ib.*

26. Upon the transfer of Louisiana, the United States succeeded to all the powers of the Intendant-Generals, and could give or withhold the completion of all imperfect titles at their pleasure. In order to exercise this power with discretion, Boards of Commissioners were established in order to enlighten the judgment of Congress, and special courts were organized in which claimants might prosecute their claims. *Ib.*

27. But in all the legislation upon the subject, the claimants were never considered as possessing a legal title, until the final assent of Congress was expressed in some mode or other to that effect. *Ib.*

28. The date of such legal title commences with the ratification by Congress, and does not extend back to the date of the imperfect title. *Ib.*

29. Therefore, the title of Cerré, being confirmed in 1836, must give way to patents for the same land, issued before that time, unless Congress had, by some law, protected the land from the location of patents. *Ib.*

30. But the acts of Congress did not so protect it, because the concession of Cerré called for no boundaries, and had never been surveyed. Before land could be reserved from sale, it was necessary to know where the land was. *Ib.*

31. The confirming act of 1836 declared that it should convey no title to any part of the land which had previously been surveyed and sold by the United States. This the United States had a right to do, because, having the plenary power of confirmation, they could annex such conditions to it as they chose. *Ib.*

32. Where claims were confirmed according to the concession, a subsequent survey made in the mode pointed out by law is conclusive upon the United States and the confirmee, to show that the land included in the survey was the land the title to which was confirmed. But it does not follow that other persons, who may previously have purchased portions of the land from the United States, subsequent to the confirming act and before the survey, are equally concluded. *Ib.*

33. The form of a Spanish title given. *Ib.*

34. The decision of this court in the case of *Stoddard et al.* v. *Chambers* (2 How., 285) re-examined and confirmed. *Mills* v. *Stoddard*, 345.

PUBLIC LANDS—(*Continued.*)
35. The original petition to the Spanish Governor of Louisiana, upon which the concession was made, stated that he "came over to this side of the M. R. S. with the consent of your predecessors." These letters stand for *Majeste Rive Sud*, and refer to the Mississippi River. *Ib.*
36. The survey of the concession in 1806 fixed its locality. It is true that the survey was a private one, but it was adopted by the commissioners, who had authority to direct such surveys as they deemed necessary. *Ib.*
37. The holder of a New Madrid certificate had a right to locate it only on public lands the sale of which was authorized by law. But lands claimed under a Spanish concession, where the claim had been filed according to the acts of Congress, were reserved from sale when the entry under the New Madrid certificate was made, viz., in 1816. Consequently, the entry was void. *Ib.*
38. The patent for the land covered by the New Madrid certificate was not issued until after Congress had renewed this reservation, viz., in 1832. Therefore, neither the entry nor patent can give a good title. *Ib.*
39. Had the patent been issued before Congress passed the act of 1832, the result would have been different. *Ib.*

LEGACIES.
See EXECUTORS AND ADMINISTRATORS, 3, 7–9.

LEX LOCI CONTRACTUS AND LEX FORI.
1. By the laws of Wisconsin, where the contract in question was made, a scroll or any device by way of seal has the same effect as an actual seal. But in New York it is different, and an action brought in New York upon such an instrument must be an action appropriate to unsealed instruments. *LeRoy* v. *Beard*, 451.
2. Therefore, where a deed was executed with a scroll in Wisconsin, which contained a covenant of seizin, and an action was brought in New York for a breach of this, it was properly an action of assumpsit, and not covenant. *Ib.*

LIMITATION OF SUITS.
1. A lapse of forty-six years is a bar to relief in equity, although the creditor, during all that time, supposed the debtor to be insolvent and not worth pursuing, where it appears that for a considerable portion of that time he was in a condition to pay, and the creditor might, by reasonable diligence, have discovered it, and recovered the money by a suit at law. *Maxwell* v. *Kennedy*, 210.
2. Where a claim to land was maintained upon an uninterrupted possession of forty years, the death of the original holder and subsequent reception of rent by his widow, did not break the continuity of possession. She is liable to account for the rent to the heirs. *Reed* v. *Proprietors of Locks and Canals*, 274.

LOTTERIES.
See CONSTITUTIONAL LAW, 6–13.

MARRIAGE SETTLEMENTS.
1. Where a married woman has power, under a marriage settlement, to dispose of property settled upon her, by the execution of a power of appointment for that purpose, and alleges afterwards that she executed the power under undue marital influence and through fraud practised upon her, but alleges no specific mode or act by which this undue marital influence was exerted, and the facts disclosed in the testimony go very far to contradict the allegation, the charge cannot be sustained. *Ladd* v. *Ladd*, 10.
2. Every feme covert is presumed, under such a settlement, to be, to some extent, a free agent. *Ib.*
3. Where the marriage settlement recited that the woman was possessed of a considerable real and personal estate, which it was agreed should be settled to her sole and separate use with power to dispose of the same by appointment or devise, and then directed that the trustee should permit her to have, receive, take, and enjoy all the interest, rents, and profits of the property to her own use, or to that of such persons as she might from time to time appoint during the coverture, or to such persons as she, by her last will and testament, might devise or will the same to, and in default of such appointment or devise, then the estate and premises aforesaid to go to those who might be entitled thereto by

MARRIAGE SETTLEMENTS—(*Continued.*)
legal distribution,—this deed enabled her to convey the whole fee, under the power, and not merely the annual interest, rents, and profits. *Ib.*
4. The word "interest" in such settlement, held to be the equivalent of "estate." *Ib.*
5. Where the marriage settlement gave her the power of appointment to the use of such persons as she might from time to time appoint, during the coverture, by any writing or writings under her hand and seal, attested by three credible witnesses, and she executed a deed which recited that the parties had thereunto set their hands and seals, and which the witnesses attested as having been *sealed* and *delivered*, this was a sufficient execution of the power, although the witnesses did not attest the fact of her *signing* it. This could be proved *aliunde*. *Ib.*

NAVY.
1. Commissions for drawing bills of exchange were not usually allowed to permanent pursers in the navy; and on the 10th of November, 1826, commissions for such services to commanders of squadrons and officers of any grade were expressly abolished. *United States* v. *Buchanan*, 83.
2. A custom cannot be set up against a settled rule; nor can it ever be binding unless it be ancient, reasonable, generally known and certain. *Ib.*
3. There are two books for the government of the officers of the navy, usually known as the "Blue Book" and the "Red Book." The "Red Book," although later in date, did not repeal the "Blue Book," except in some few specified particulars. *Ib.*
4. The duty of paying mechanics and laborers at the navy-yards was imposed, by the Blue Book, upon pursers who were stationed there. It was made a part of their official duty. As this was not repealed by the Red Book, no commission can be allowed to a purser for performing this service. *Ib.*
5. The question, whether or not these acts were parts of the official duty of pursers, was one of law, to be decided by the court, and not of fact to be left to the jury. *Ib.*
6. Losses alleged to have been sustained by a purser, in consequence of an order by the commodore forbidding certain sales of slops, cannot be set off in a suit by the United States upon the purser's bond. *Ib.*
7. The statute of March 3, 1797, which allows set-offs, has for its object the settlement between the parties of their mutual accounts or debts. But wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off. *Ib.*
8. It appears also that the government is not responsible for a wrong committed by one officer upon another. The party injured has other modes of redress than setting off the damages as a defence, when sued upon his bond by the United States. *Ib.*

ORPHANS' COURTS.
See EXECUTORS AND ADMINISTRATORS, 1, 2, 7.

PARTNERSHIP.
See CHANCERY, 22–27.

PATENT RIGHTS.
1. The following question sent up to this court upon a certificate of division in opinion between the judges of the Circuit Court,—viz, "Whether, according to the true construction of the Woodworth patent as amended, the machines made or used by the defendant at the time of filing the bill, or either of them simply, do or do not infringe the said amended letters patent,"—is a question of fact, over which this court has no jurisdiction. *Wilson* v *Barnum*, 258.
2. The jurisdiction given to it by statute in certified cases only extends to points of law. *Ib.*

PENSIONS.
See FRAUDS ON THE GOVERNMENT.

PLEAS AND PLEADINGS.
1. Where, upon the case stated in a bill in equity, the complainant is not entitled to relief by reason of lapse of time and laches on his part, the defendant may demur. *Maxwell* v. *Kennedy*, 210.
2. By the laws of Wisconsin, where the contract in question was made, a scroll or a device by way of seal has the same effect as an actual seal. But in New York it is otherwise, and an action brought in New York

PLEAS AND PLEADINGS—(*Continued.*)
upon such an instrument must be an action appropriate to unsealed instruments. *LeRoy* v. *Beard*, 451.
2. Therefore, where a deed was executed with a scroll in Wisconsin, which contained a covenant of seizin, and an action was brought in New York for a breach of this, it was properly an action of assumpsit, and not covenant. *Ib.*
4. It was not necessary in the declaration to allege an eviction, because the covenant was broken as soon as made. *Ib.*
POWERS OF ATTORNEY.
See DEEDS, CONSTRUCTION OF, 1, 2.
PRACTICE.
1. Where an "action of jactitation" or "slander of title" was brought in a state court of Louisiana and removed into the Circuit Court of the United States by the defendant, who was a citizen of Mississippi (the persons who brought the action being in possession of the land under a legal title) and the defendant pleaded in re-convention, setting up an equitable title, and the court below decreed against the defendant, it was proper for him to bring the case to this court by appeal, and not by writ of error. *Surgett* v. *Lapice*, 48.
2. This case distinguished from that of the *United States* v. *King*, 3 and 7 Howard, 773 and 844. *Ib.*
3. An error in a citation, calling Mary Rice the wife of Charles Bowers, whereas she was the wife of Charles Rice, is not fatal in a case coming from Louisiana. The practice there is for the husband to assent when the wife brings a suit, so that his name is merely a matter of form. *Peale* v. *Phipps*, 256.
4. Nor is it a fatal error when the citation was issued at the instance of E. Peale as plaintiff in error, instead of Elijah Peale, Trustee of the Agricultural Bank of Mississppi. *Ib.*
5. The acceptance of the service of the citation by the attorney for the parties shows that the error led to no misapprehension. *Ib.*
6. The plaintiffs in ejectment claimed below the whole of certain property as the heirs of a devisee; and the title of the devisee being held not to be good, they claimed in this court a portion of the property as a portion of the heirs of the person upon whom the descent was cast. But this point was not made in the court below, and therefore cannot be made here. *Doe* v. *Watson*, 263.
7. Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, this court will not render a judgment, but remand the cause to the court below for a *venire facias de novo*. *Prentice* v. *Zane's Adm.*, 470.
8. Therefore, where a suit was brought by an indorsee upon a promissory note, and the special verdict found that the original consideration of the note was fraudulent on the part of the payee, but omitted to find whether the holder had given a valuable consideration for it or received it in the regular course of business, and the court below gave judgment for the defendant, this court could not decide whether that judgment was erroneous or not, and would have been compelled to remand the case. *Ib.*
9. But the parties below agreed to submit the cause to the court, both on the facts and the law. This court must presume that the court below founded its judgment upon proof of the fact as to the manner in which the holder received it, and must therefore affirm the judgment of the court below. *Ib.*
10. Some of the distinctions stated between bills of review, of revivor, and supplemental and original bills in chancery. *Kennedy et al.* v. *Georgia State Bank*, 586.
11. This court, as an appellate court, has the power to allow amendments to be made to the record before it, although the general practice has been to remand the case to the Circuit Court for that purpose. *Ib.*
12. When a cause is brought before this court on a division in opinion by the judges of the Circuit Court, the points certified only are before it. The cause should remain on the docket of the Circuit Court, and at their discretion may be prosecuted. *Ib.*
13. If the jurisdiction of a Circuit Court be not shown in the proceedings in

PRACTICE—(*Continued.*)
the case, its judgment is erroneous, and liable to be reversed; but it is not an absolute nullity. *Ib.*
14. But when an amendment to the record was made by consent of counsel in this court, which amendment set forth the jurisdiction, a mandate containing that amendment ought to have prevented any subsequent objection to the jurisdiction in the Circuit Court. *Ib.*
15. A decree for a sale, made with the approbation of counsel filed in court, removes all preceding technical objections. *Ib.*

PURSERS.
See NAVY.

QUESTIONS OF LAW AND FACT.
1. It is the duty of the court to give a construction to a deed so far as the intention of the parties can be elicited therefrom; but the doubt in the application of the descriptive portion of a deed to external objects usually arises from what is called a latent ambiguity, which has its origin in parol testimony and must necessarily be solved in the same way. It therefore, in such cases, becomes a question to be decided by a jury, what was the intention of the parties to a deed. *Reed* v. *Proprietors of Locks and Canals*, 274.
2. Therefore, there was no error in the following instructions given by the court to the jury, viz.:—"That if the jury believed from the evidence, looking to the monuments, length of lines, and quantities, actual occupation, &c., that it was more probable that the parties to the mortgage intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants." *Ib.*

RIGHT (WRIT OF).
1. The plaintiff in a writ of right produced a patent from the United States, dated in 1839, which contained sundry recitals, referring to titles of anterior date derived from acts of Congress for the adjustment of claims to lands. But the patent itself was issued under an act of Congress in 1836. *Marsh* v. *Brooks*, 223.
2. The defendant, in order to show an outstanding title, gave in evidence a treaty between the United States and the Sac and Fox Indians, in which this, with other lands, was reserved for the half-breeds, and an act of Congress passed in 1834 relinquishing the reversionary interest of the United States to these half-breeds. *Ib.*
3. This was sufficient to show an outstanding title. *Ib.*
4. The recitals in a patent are not enough to show that the title is of an earlier date than the patent itself, although they are evidence for some purposes. Nor was it necessary for the defendant to show that any of the half-breeds were in existence at the time of the trial. *Ib.*

SALES.
1. Where personal property is, from its character or situation at the time of the sale, incapable of actual delivery, the delivery of the bill of sale, or other evidence of title, is sufficient to transfer the property and possession to the vendee. *Gibson* v. *Stevens*, 384.
2. Where articles of commerce were purchased in the state of Indiana, and the vendors, in whose warehouses they were lying, gave a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal-boats soon after the opening of canal navigation, these documents transferred the property and the possession of the articles to the purchasers. *Ib.*
3. These documents, being indorsed and delivered to a merchant in New York, in consideration of advances of money in the usual course of trade, transferred to him the legal title and constructive possession of the property. *Ib.*
4. Therefore an attachment subsequently issued, at the instance of a creditor of the original purchasers, which was levied upon the property in question, could not be maintained. *Ib.*
5. This court will judicially recognize this branch of trade. It has existed long enough to assume a regular form of dealing, and its ordinary course and usages are now publicly known and understood. *Ib.*
6. The New York merchant stood in the position of an actual purchaser to the extent of his advances, and not in that of a factor who had made advances upon goods in his possession. *Ib.*

SALES—(*Continued.*)
7. A guarantee by the first sellers that the articles should pass inspection did not change the original sale into an executory contract. It was nothing more than the usual warranty of the soundness of the goods sold. *Ib.*

SET-OFF.
1. The statute of March 3, 1797, which allows set-offs, has for its object the settlement between the parties of their mutual accounts or debts. But wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off. *United States* v. Buchanan 89.

STATUTES.
Construction of, and distinction between private and public, see CHANCERY, 29–35.
1. In the year 1819, the Legislature of Illinois authorized Samuel Wiggins, his heirs and assigns, to establish a ferry on the east bank of the River Mississippi, near the town of Illinois, and to run the same from lands "that may belong to him," provided the ferry should be put into actual operation within eighteen months. *Mills* v. *St. Clair County*, 569.
2. At this time he had no land, but within the eighteen months acquired an interest in a tract of one hundred acres. *Ib.*
3. In 1821, another act was passed, authorizing him to remove the ferry "on any land that may belong to him" on the said Mississippi River, under the same privileges as were prescribed by the former act. *Ib.*
4. The words of this act, "on any land that may belong to him," must be construed to apply to the lands which then belonged to him, and not to such as he obtained after the passage of the act, viz., in 1822. *Ib.*
5. The following rules for construing statutes applied to the case, viz.:—
First,—That in a grant, designed by the sovereign power making it to be a general benefit and accommodation to the public, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government; and therefore should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed, it must fall.
Secondly,—If the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any apparent violation of the apparent objects of the grant, if in such case one interpretation would render the grant inoperative and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted. *Ib.*

TAXES.
See CONSTITUTIONAL LAW, 1–4; 15, 16.

TRUST DEEDS.
1. A merchant who owed debts upon his own private account, and was also a partner in two commercial houses which owed debts upon partnership account, executed a deed of trust containing the following provisions, viz.:—It recited a relinquishment of dower by his wife in property previously sold and in the property then conveyed, and also a debt due to the daughter of the grantor, which was still unpaid, and then proceeded to declare that he was indebted to divers other persons residing in different parts of the United States, the names of whom he was then unable to specify particularly, and that the trustee should remit from time to time to Alexander Neill, of the first moneys arising from sales, until he shall have remitted the sum of $15,000, to be paid by the said Neill to the creditors of the said grantor, whose demands shall then have been ascertained; and if such demands shall exceed the sum of $15,000, then to be divided amongst such creditors *pari passu:* and out of further remittances there was to be paid the sum of $12,000 to his wife as a compensation for her relinquishment of dower, and next the debt due to his daughter, and after that the moneys arising from further sales were to be applied to the payment of all the creditors of the grantor whose demands shall then have been ascertained. In case of a surplus, it was to revert to the grantor. *Murrill* v. *Neill*, 414.
2. The construction of this deed must be, that the grantor intended to pro-

TRUST DEEDS—(*Continued.*)
vide for his private creditors only out of this fund, leaving the partnership creditors to be paid out of the partnership funds. *Ib.*
3. Under the deed, it was the duty of the trustee to divide the first $15,000 amongst the private creditors of the grantor, and exclude from all participation therein the creditors of the two commercial houses with which the grantor was connected; next to pay the debts due to the wife and daughter; then to pay in full the private creditors, or divide the amount amongst them, proportionally. *Ib.*

WILLS.
1. Where a testator made certain devises to his two grandchildren, "provided, and the legacies herein before devised are upon this special condition, that, if both my said grandchildren shall happen to die under age and without any lawful issue, then it is my will that three fourth-parts shall be equally divided between Sarah Smallwood and others," &c., and the two grandchildren lived many years after they arrived at full age, and then both died without issue, the devise over to Sarah Smallwood, &c., never took effect, because the two grandchildren both arrived at full age. *Doe* v. *Watson*, 263.
2. The plaintiffs below having claimed the whole as the heirs of Sarah Smallwood, the court instructed the jury that they could not recover. But the plaintiffs below claimed, in this court, that they were entitled to recover a part, because they were a portion of the heirs of the two grandchildren. This point was not made in the court below, and therefore cannot be made here. *Ib.*
3. The Supreme Court of Pennsylvania decided, with regard to this very will, that the devise over to Sarah Smallwood never took effect. This decision was made in 1795, and the acquiescence of half a century would seem to close all litigation under the will. But even if it did not, this court is of the same opinion. *Ib.*

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